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# Responding to the Litigation Explosion: The Plain Meaning of Executive Branch Primary over Immigration

Kevin R. Johnson

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# RESPONDING TO THE "LITIGATION EXPLOSION": THE PLAIN MEANING OF EXECUTIVE BRANCH PRIMACY OVER IMMIGRATION

KEVIN R. JOHNSON\*

*In the October 1991 Term, the United States Supreme Court handed down an unprecedented four immigration decisions. In all four, the Court decided in favor of the Immigration and Naturalization Service. In this Article, Professor Kevin R. Johnson explains and analyzes these recent decisions and considers their implications for future immigration cases. According to Professor Johnson, the Court exhibited a strong but misplaced reliance upon the deference and plain meaning doctrines in rendering these decisions. Because the INS has demonstrated an anti-immigrant, pro-enforcement bias, and because the executive branch has tremendous leeway in the foreign policy realm, deference is ill-advised in the immigration context. Similarly, because of the rich legislative history of the immigration laws, plain meaning interpretation provides an ineffective means of carrying out congressional intent. Professor Johnson argues that the use of these two doctrines, in immigration cases and elsewhere, is symptomatic of the Rehnquist Court's underlying agenda: docket-clearing. In conjunction, deference and plain meaning tend both to speed the disposition of particular cases and to discourage litigation in immigration cases at the expense of immigrants seeking asylum or the withholding of deportation. In light of the rigorous applications of these doctrines, Professor Johnson concludes, the prospects for immigrants seeking fair treatment in the courts look quite dim.*

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I was counsel of record on an amicus curiae brief submitted in the Supreme Court on behalf of the American Immigration Lawyers Association in *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), and co-counsel on amici curiae briefs submitted on behalf of certain members of Congress in the Court of Appeals for the Second Circuit and the Supreme Court in *INS v. Doherty*, 112 S. Ct. 719 (1992).

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*Delay is preferable to error.*

Thomas Jefferson to George Washington,  
May 16, 1792.<sup>1</sup>

## I. INTRODUCTION

Many in the legal profession have curious views of immigration law. To them, it is nothing less than dull. A specialized series of statutory provisions and regulations that are at best byzantine and at worst incom-

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1. Reprinted in THE QUOTABLE LAWYER 99 (David S. Shrager & Elizabeth Frost eds., 1986).

prehensible. Popular opinion has it that, because hundreds of thousands of people attempt to immigrate to the United States each year, the system is flooded with cases often raising recurrent, lackluster, and sometimes esoteric, issues. Furthermore, many believe that the Immigration and Naturalization Service (INS) possesses the expertise necessary to dispose of the high volume of complex, yet trivial, matters, thereby relieving the already overloaded federal courts of further time demands.

Many attorneys, federal judges, and academics share such misconceptions.<sup>2</sup> The United States Supreme Court's most recent decisions on the subject suggest that it does as well. That is problematic because the Supreme Court decisions are often best remembered for the signals they send.<sup>3</sup> Despite accepting fewer cases for review than in the recent past,<sup>4</sup> the Court in the October 1991 Term decided an unprecedented four im-

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2. One may only wonder why immigration is relegated to the shadows of mainstream legal discourse. It may be because immigration law often involves people of color from a different culture who do not speak English. Cf. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-23 (1989) (noting that, in evaluating constitutionality of restraints on racist speech, first amendment law traditionally has failed to weigh impact of such speech on victims). Racism is part and parcel of the history of immigration law and policy in the United States. See *infra* note 131 and accompanying text; see, e.g., EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 224 (1986) (including index with following racist reference: "Wetbacks, see Mexicans"); Douglas Jehl, *Buchanan Raises Specter of Intolerance, Critics Say*, L.A. TIMES, Mar. 17, 1992, at A1 ("[I]f we had to take a million immigrants in say, Zulus, next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?"). See generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 *passim* (2d ed. 1963) (describing history of nativism underlying immigration laws and policies in the United States). Whatever the cause, immigration law, like American Indian law, is buried in the recesses of American jurisprudence. See generally Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 742-59 (1989) (discussing the relationship between the federal courts and American Indian law).

3. *Brown v. Board of Educ.*, 347 U.S. 483 (1954), is probably the most famous example. A more recent, less striking instance is *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989), which, although expressly declining the invitation to overrule *Roe v. Wade*, 410 U.S. 113 (1973), was widely understood as giving state legislatures a green light to pass laws restricting the right to an abortion. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2832-33 (1992) (upholding most of the restrictive Pennsylvania law passed in response to *Webster*).

4. See *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 61 U.S.L.W. 3098 (U.S. Aug. 11, 1992) (showing that number of signed opinions dropped from 129 in 1989-90 to 107 in 1991-92 Term); Linda Greenhouse, *Lightening Scales of Justice: High Court Trims Its Docket*, N.Y. TIMES, March 7, 1992, at A1 (reporting that, despite increase in petitions for writs of certiorari, the Court will decide nearly one-third fewer cases than during peak years of the 1980s); see also *Haitian Refugee Ctr., Inc. v. Baker*, 112 S. Ct. 1245, 1246 (1992) (Blackmun, J., dissenting from denial of certiorari) (claiming that a "quick glance at this Court's docket reveals not only that we have room to consider these issues, but that they are at least as significant as any we have chosen to review today").

migration cases.<sup>5</sup> In each one, the Court ruled in favor of the INS and against the immigrant.<sup>6</sup> To many, those decisions exemplify the Rehnquist Court's views about immigrants' rights.<sup>7</sup>

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5. *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992); *INS v. Doherty*, 112 S. Ct. 719 (1992); *INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551 (1991); *Ardestani v. INS*, 112 S. Ct. 515 (1991). By comparison, the Court issued seven immigration decisions from 1971 to 1981. See Arthur D. Hellman, *The Supreme Court, The National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 631-32 & n.498 (1983).

6. For reasons previously explained, I prefer the term "immigrant," or other more neutral terms, to "alien," the somewhat pejorative referent of choice of the immigration laws. See Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 281 n.5.

7. Indeed, the Bush administration may well have understood the Court's decisions as affording it a free hand in the treatment of persons fleeing the violent political turmoil of Haiti, and thereby implicitly sanctioning the extraordinary program of interdiction on the high seas, detention in Guantánamo Bay in Cuba where the INS screened the persons to determine asylum eligibility, and repatriation of Haitians found ineligible. See *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3 (1992) (staying judgment of court of appeals pending filing of petition for writ of certiorari); *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct. 1714 (1992) (staying preliminary injunction of program); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1515 (11th Cir. 1992) (reversing district court's enjoining of program), *cert. denied*, 112 S. Ct. 1245 (1992). In stark contrast, the Bush Administration during roughly the same period treated Cubans fleeing Fidel Castro's Cuba as "political refugees" deserving of more sympathetic treatment. See, e.g., Larry Rohter, *New Wave of Cubans Sails to Florida*, N.Y. TIMES, Oct. 7, 1992, at A1. In defending the Haitian interdiction program to the Supreme Court, Solicitor General Kenneth Starr argued that Executive prerogative over immigration matters barred judicial interference with these measures. See Barbara Crossette, *White House Presses a Ban on Haitians*, N.Y. TIMES, Feb. 15, 1992, at A3. The Bush administration continued the program despite widespread reports of rampant political persecution following the violent military coup in Haiti. See, e.g., Howard W. French, *16 Haitians Slain in Week of Strife*, N.Y. TIMES, May 28, 1992, at A3; see also DEPARTMENT OF STATE, 102D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, at 633-34 (Joint Comm. Print 1992) ("Following the coup . . . , the [Haitian] army resorted to brutality and massacre to control the population . . . . [T]he army employed violence on several occasions to intimidate opposition political supporters, popular organizations, the urban poor, and the media, and otherwise to discourage antiregime activity. . . . Hundreds were killed in political violence during 1991."). To make matters worse, even though the INS determined that some of the interdicted persons had a well-founded fear of persecution if returned to Haiti, deficient recordkeeping resulted in the mistaken return of some of them. See U.S. GEN. ACCOUNTING OFFICE, REFUGEES: U.S. PROCESSING OF HAITIAN ASYLUM SEEKERS 2-4 (1992).

After a series of victories in immigration cases in the Supreme Court, President Bush increased the harshness of the interdiction program and issued an Executive Order authorizing the Coast Guard to halt all boats carrying Haitians and to escort them back to Haiti, and requiring Haitians seeking asylum in the United States to apply at the American Embassy in Haiti. See Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992). The Court of Appeals for the Second Circuit held that the new policy was unlawful and enjoined it, an injunction that the Supreme Court quickly stayed so that the challenged practice might continue. See *McNary v. Haitian Ctrs. Council, Inc.*, 969 F.2d 1350 (2d Cir.), *stay granted*, 113 S. Ct. 3, *cert. granted*, 113 S. Ct. 52 (1992). For a discussion of the factors, including the Supreme Court's deference to the executive branch in immigration matters, see Kevin P. Johnson, *The Judiciary's Acquiesce to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas: The Case of the Haitian Asylum Seekers*, 7 GEO. IMMIGR. L.J. (forthcoming 1993).

Besides the fact that the INS prevailed in each case, two characteristics of the Court's decisions may increase their symbolic value. First, the immigration decisions reflect the Supreme Court's increasing willingness to defer to the judgment of the executive branch in immigration matters. In reviewing the conduct of administrative agencies, the Court is heavily influenced by a "strong" reading of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>8</sup> requiring courts to generally avoid disturbing the judgments of administrative agencies.<sup>9</sup> In the four immigration decisions, the Court consistently deferred to the position of the INS or another adjudicatory arm of the Department of Justice in immigration matters, the Board of Immigration Appeals (BIA). In so doing, it ignored the persistent claims that the INS is anti-immigrant and focuses almost exclusively on its enforcement rather than its service functions, and that the INS has been found by lower courts to engage in abusive and unlawful conduct toward immigrants, particularly persons seeking asylum in the United States.<sup>10</sup> Though not the subject of such fervent criticism, the BIA often is charged with ordering the deportation of persons based more on the enforcement emphasis of the Attorney General than the requirements of the Immigration and Nationality Act (INA).<sup>11</sup> The BIA specifically has been criticized for basing asylum decisions on the foreign policy desires of the President in violations of the neutral aspirations of the law.<sup>12</sup> Nonetheless, the Supreme Court gave decisions of the INS and BIA the deference afforded to the conduct of any other agency.

Similarly, the Court reviewed orders to deport persons to countries where they allegedly would face political persecution as no different in principle from any other agency decision.<sup>13</sup> Despite the undisputed life and liberty interests at stake,<sup>14</sup> the Court simply deferred to the agency judgment because "agency decisions" warrant deferential review. Put bluntly, in the view of the Rehnquist Court, a deportation order should

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8. 467 U.S. 837 (1984).

9. See *infra* text accompanying notes 23-44; see also *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992) (stating that *Chevron* announced a "fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency").

10. See *infra* text accompanying notes 130-90 and 326-28.

11. See Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

12. See *infra* text accompanying notes 130-90.

13. See *infra* text accompanying notes 130-90.

14. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

receive no more scrutiny by a reviewing court than a rate-setting decision.

The Court's deference to the INS and BIA extends the deference principle to a body of law historically renowned for the tremendous leeway afforded the executive branch. Besides encouraging the President to proceed arbitrarily in immigration matters, the decisions serve as a lesson to the lower courts to review administrative rulings with great deference. That development is ominously reminiscent of the so-called "plenary power" doctrine, which the Court has invoked selectively over the last century as a bar to meaningful judicial review of immigration decisions by Congress and the executive branch.<sup>15</sup>

Second, the immigration decisions reflect the Court's growing adherence to the "plain meaning" approach to statutory interpretation and the application of that doctrine to the immigration laws.<sup>16</sup> Plain meaning tenets propounded by Justice Antonin Scalia require the federal courts, when interpreting the meaning of a statutory text, to limit themselves to considering the plain meaning of the words of the law passed by Congress to the exclusion of other sources, such as legislative history and purpose.<sup>17</sup>

In three of the four immigration cases decided during the most recent term, the Court used plain meaning methodology to construe literally the INA and regulations promulgated thereunder and defer to the position of the INS or BIA. By so doing, the Court left the firm impression that the INA generally is to be interpreted just as any other statute. That approach has devastating effects that may be peculiar to the immigration world. Most importantly, the INA and its many amendments have a rich legislative history that reflects Congressional purpose and illuminates the plain meaning of an often dense statutory text.<sup>18</sup>

Although harsh results could have been avoided by interpreting the INA in accordance with legislative history and Congressional purpose, the Court adamantly refused to deviate from the most literal reading of the law in three cases,<sup>19</sup> interpreting the intricate statute in a vacuum,

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15. See *infra* text accompanying notes 130-35.

16. See *infra* text accompanying notes 213-449.

17. See *infra* text accompanying notes 46-78 and 213-449. Debate about the proper mode of statutory interpretation, of course, predates Justice Scalia's arrival on the Court. Compare *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571-77 (1982) (Rehnquist, J.) (following plain meaning approach) with *id.* at 577-90 (Stevens, J., dissenting) (noting inconsistency in Court's method of interpreting statutes and advocating consideration of variety of factors to avoid literal reading of statute). However, Justice Scalia's strongly held views on the subject have rekindled and sharpened the debate. See *infra* text accompanying notes 46-78.

18. See *infra* text accompanying notes 191-212.

19. See *infra* text accompanying notes 213-379.

without regard to its history or the realities of the immigrants' plight. Yet, remarkably, when the plain meaning of the text tended to support the immigrant's position, the Court considered a wealth of extra-textual evidence, much of it of doubtful trustworthiness, to vindicate the INS position.<sup>20</sup> This suggests that the Rehnquist Court is willing to invoke the plain meaning doctrine selectively in interpreting the INA to ensure that the courts defer to the executive branch. Deference, though often achieved by plain meaning interpretation of the law, appears to be the Court's primary goal.

By mandating limited judicial review of immigration cases, often through a plain meaning statutory interpretation, the Court has created a doctrinal framework virtually mandating deference to the INS. As a result, one cannot be certain that an agency ruling, particularly one involving claims to relief from deportation, is consistent with the laws passed by Congress and is unbiased, accurate, and fair.

This Article suggests that the deference and plain meaning doctrines are merely symptomatic of the Court's approach to a number of substantive areas. The Rehnquist Court appears generally motivated by a desire to respond to the so-called "litigation explosion."<sup>21</sup> To reduce a growing judicial workload filled with a significant number of cases perceived to be "marginal" or "trivial," and simply unworthy of the federal judiciary, the Court has moved toward bright line rules and heavy presumptions that strive to avoid time-consuming, case-specific inquiry. Because such rules presuppose results in the individual case, they tend to reduce the time and costs of decisionmaking, discourage litigation, and limit appeals.<sup>22</sup> This is accomplished in two distinct ways. First, by employing

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20. See *infra* text accompanying notes 380-449 (discussing *INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551 (1991)).

21. See *infra* text accompanying notes 79-129.

22. There is, of course, an ideological bent to these rules as well. The "new textualism," see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640-66 (1990) [hereinafter Eskridge, *New Textualism*], requires the courts to ignore legislative history and statutory purpose endorsed by a Congress controlled by Democrats for most of recent memory. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 293 (1985) (noting that "most 'strict constructionists' are political conservatives" who think legislation often "goes too far and want the courts to rein the legislators in"); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 415-17 (1991) [hereinafter Eskridge, *Overriding Supreme Court Decisions*] (discussing how plain meaning interpretation shifts power from Congress to executive branch). The deference doctrine, when invoked during the 1980s and early 1990s, shielded the decisions of administrative agencies controlled by a Republican President. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 n.91 (1989); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1373 (1990).

The political overtones might suggest why Justice (now Chief Justice) Rehnquist, who



these default principles, courts may easily and quickly decide certain categories of cases compromising a not insignificant portion of their docket. Second, the rules necessitate that parties who must argue against their presumptive effect (for example, that the court should not defer to an agency decision or should look beyond the plain meaning of the statute) will be discouraged from litigating the issue. By facilitating quick disposal of the ordinary, run-of-the-mill case, such default principles allow the Supreme Court, as well as the lower courts, to manage an increasing workload. The end result of such an approach, however, is that broad concerns with judicial economy may well prevail over justice in the individual case.

In the immigration realm, the deference and plain meaning default principles have implications that differ in salient respects from the substantive impact that application of the doctrines has on other bodies of law. As a disenfranchised group, noncitizens lack the political clout to check agency misconduct, including violation of the laws passed by Congress, and override the courts' plain meaning interpretations of the INA. Thus, because the public is not directly affected by such events, protection of the immigrant is unlikely even when a majority of the voters agree with the noncitizens. Consequently, the executive branch ordinarily will prevail when challenged by the immigrant; challenges to INS practices, procedures, and decisions, as well as BIA rulings, generally will be discouraged; and the Supreme Court and lower courts will have a device for easily disposing of a group of "trivial" cases involving a complex statutory scheme.

This Article explores the distinct impact of the deference and plain meaning doctrines on immigration law and suggests that these doctrines share some common roots with the Rehnquist Court's approaches to other substantive areas. Part I sketches the Court's recent pronouncements about deference to agency action. Part II outlines the movement of the Supreme Court toward plain meaning interpretation. Part III argues that broader concerns, including a desire to quell the "litigation explosion," help explain the emergence of the deference and plain meaning doctrines and more generally influence the Rehnquist Court's jurisprudence. Part IV suggests that the executive branch's immigration deci-

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advocated revival of the non-delegation doctrine—the antithesis of deference to agency action—in reviewing administrative decisionmaking during Jimmy Carter's presidency, *see* *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672-76, 685-88 (1980) (Rehnquist, J., concurring in judgment), embraced deference to agency action under Republican administrations. *See* *Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991) (Rehnquist, C.J.); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part, dissenting in part).

sions should not necessarily be entitled to the same deference that the actions of other administrative agencies are given and that a plain meaning interpretation of the INA has a special, and often irrevocable, impact on noncitizens. Finally, Part V of this Article reviews, analyzes, and critiques the four recent immigration decisions and shows how the Court's commitment to caseload reduction through deterring future litigation and docket clearing affected the results.

## II. PRESUMPTIVE DEFERENCE TO ADMINISTRATIVE AGENCIES

The Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* stressed that, because administrative agencies are politically accountable, it is entirely appropriate to defer to reasonable agency interpretations of ambiguous statutes.<sup>23</sup> The rationale is that Congress implicitly delegated policymaking authority to the agency through a statutory ambiguity.<sup>24</sup> To remain faithful to the delegation theory, courts should not defer to agency interpretation of *unambiguous* laws or *unreasonable* interpretations of ambiguous ones. As American constitutional tradition rooted in *Marbury v. Madison*<sup>25</sup> suggests, and as *Chevron* acknowledged, the judiciary is the final arbiter of whether a law is ambiguous or the agency interpretation is unreasonable.<sup>26</sup>

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23. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984); see, e.g., *Rust*, 111 S. Ct. at 1767-69. The theory was laid out in *Chevron* as follows:

Judges . . . are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. *While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .*

*Chevron*, 467 U.S. at 865 (emphasis added); see also STEPHEN H. LEGOMSKY, SPECIALIZED JUSTICE 11-13 (1990) (noting benefits of expertise and deference); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574-78 (1985) (same).

24. See *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2533-34 (1991) (finding ambiguity in the Black Lung Benefits Reform Act of 1977); *Adams Fruit Co., Inc. v. Barrett*, 110 S. Ct. 1384, 1390 (1990) (suggesting that scope of Migrant and Seasonal Agricultural Worker Protection Act may be ambiguous).

25. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department, to say what the law is.").

26. See *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent" by "employing traditional tools of statutory construction.") (citations omitted). Despite that caveat, by requiring deference to agency legal interpretations in certain instances, *Chevron* is in tension with *Marbury*. See Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283 (1986); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 457 (1989) (discussing how deference creates a new relationship between courts and agen-

*Chevron* controls judicial review of an agency's interpretation of law,<sup>27</sup> and the Court commonly recites it for the broader principle of deference to agency action of all sorts.<sup>28</sup> Its logic extends beyond simple legal interpretations to virtually all types of agency decisions, including fact-finding and application of law to fact.<sup>29</sup> Despite *Chevron*'s rise to preeminence, not all the Justices are entirely comfortable with the extension of the deference principle. Justice Stevens,<sup>30</sup> *Chevron*'s author, generally takes a decidedly more cautious view of the deference doctrine than Justice Scalia often does.<sup>31</sup> The Court's inconsistency over whether an agency interpretation of law is entitled to deference illustrates the doctrine's uncertainty.<sup>32</sup> Although simple in principle and the subject of an

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cies); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971-1003 (1992) (discussing the revolutionary potential of *Chevron*). That tension may help explain why the lower courts frequently appear confused about the appropriate scrutiny to afford such interpretations. See, e.g., *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990) (per curiam) ("Where the resolution of this matter involves a question of statutory interpretation, we review the BIA's decision *de novo*. . . . We are also obliged, however, to defer to the BIA's interpretation of the applicable statute if that interpretation is reasonable.") (citations omitted).

27. See, e.g., *United States v. Alaska*, 112 S. Ct. 1606, 1610 (1992).

28. See, e.g., *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992) (deferring to EPA's interpretation of water quality standard and emphasizing that "EPA's reasonable, consistently held interpretation of those standards is entitled to substantial deference") (citing *Chevron*, 467 U.S. at 837).

29. See Farina, *supra* note 26, at 457.

30. See William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1120-21; see, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

31. See, e.g., *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-83 (1988) (Scalia, J., concurring in judgment); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133-34 (1987) (Scalia, J., concurring); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment). More recent opinions, however, hint that Justice Scalia is less wedded to the deference principle than his earlier opinions suggested. See *United States v. Burke*, 112 S. Ct. 1867, 1875 (1992) (Scalia, J., concurring in judgment) (claiming that IRS interpretation of statute was undeserving of deference because it was "not within the range of reasonable interpretation of the statutory text"); *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1237 (1991) (Scalia, J., concurring in judgment) ("[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (stating that, because plain meaning generally answers question, statutory ambiguity triggering *Chevron* deference is relatively rare).

32. See Merrill, *supra* note 26, 971-1003 (concluding, based on empirical study of Court's deference decisions, that Court has inconsistently applied *Chevron*). Compare *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992) (refusing to defer to NLRB's interpretation of statute) with *id.* at 852-57 (White, J., dissenting) (arguing in favor of deference); compare *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) (refusing to defer to Attorney General's construction of Voting Rights Act) with *id.* at 834 (Stevens, J., dissenting) (pointing out that in previous cases, the Court exhibited "considerable deference" and accepted Attorney General's interpretation of the Act and should do so in this case).

ever-growing body of Supreme Court decisions and academic commentary,<sup>33</sup> *Chevron* deference fails to answer definitively some fairly rudimentary questions. The most important of these is: under what circumstances should a court defer to the agency?

The Court's unwillingness to adhere consistently to *Chevron* illustrates that other interests sometimes outweigh the perceived benefits gained from the deference presumption.<sup>34</sup> When the substantive issue at stake becomes too significant or agency error is perceived, the deference presumption gives way. Consequently, the Court at times deviates from the presumption, and the *Chevron* caselaw has developed in a somewhat "jagged" fashion.<sup>35</sup>

One recent example of the Court's deviation from the logic of *Chevron* is *Lechmere, Inc. v. NLRB*.<sup>36</sup> To avoid deferring to a National Labor Relations Board rule arguably infringing on an employer's property rights, the Court held that *stare decisis* required an agency to follow its previous interpretation of the law.<sup>37</sup> It is unclear, however, why the prudential doctrine of *stare decisis*, often downplayed by the Rehnquist Court,<sup>38</sup> should trump the deference principle. Similarly, although *Chevron* favors deference,<sup>39</sup> the Court refuses to defer to agency interpretations of law that it labels as "litigating positions," that is, positions asserted by agencies in the course of litigation as opposed to during formal adjudications or rulemakings.<sup>40</sup>

Despite marginally increasing judicial workload, the Court might ensure better, more accurate administrative decisionmaking by adopting a careful case-specific analysis of the factors bearing on the propriety of

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33. See, e.g., Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 843-44 (1990); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2119-20 (1990).

34. See *infra* text accompanying notes 36-40.

35. Cf. MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 70-79 (1988) (explaining that courts overrule precedent when decisions applying it follow "jagged" path).

36. 112 S. Ct. 841 (1992).

37. See *id.* at 847-48 (relying upon *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990)).

38. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-11 (1991) (overruling two- and four-year old precedents and emphasizing that "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent' " in constitutional cases) (citation omitted). But cf. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-12 (1992) (plurality opinion) (refusing on *stare decisis* grounds to overrule *Roe v. Wade*, 410 U.S. 113 (1973)). Retired Justice Powell even felt it necessary at one time to lecture the Rehnquist Court on the importance of adherence to precedent. See The Honorable Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 44 REC. B.A. CITY OF N.Y. 813, 814-23 (1989).

39. See Scalia, *supra* note 31, at 519.

40. See, e.g., *Martin v. Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1179 (1991); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

deference to an agency decision. The proper question is whether a particular decision by a specific agency merits deference. Agency decisions may differ in a number of salient ways. Rather than adopt crude presumptions, the Court should look to the features of the particular statute interpreted and applied by the agency in determining the proper degree of deference to afford an agency decision.<sup>41</sup> Because impartial decision-making is a critical ingredient in ensuring procedural fairness to the individual affected, any traces of partiality should bear heavily on whether to defer to an agency decision.<sup>42</sup> In addition, the nature of the rights implicated by the decision, as well as the likelihood of harm caused by error in decisionmaking, should be considered pertinent when determining the scope of review.<sup>43</sup> Common sense suggests that a decision affecting life and liberty interests, such as deportation, should receive more scrutiny than those involving more mundane matters, such as a rate-setting decision.

By weighing such characteristics of the agency decision, rigorous judicial review might be reserved for administrative action that demands the most careful scrutiny. Nonetheless, the Supreme Court, perhaps because of the time and costs of such review, and the litigation that might result from the uncertainty generated about whether the particular agency decision warrants deference,<sup>44</sup> generally refuses to consider such factors when determining the degree of review that an agency decision deserves.

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41. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 652-58 (1980) (plurality opinion).

42. See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-80 (1975); see, e.g., *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'") (citation omitted); see also Sunstein, *supra* note 33, at 2101 (suggesting that the rule of deference to agency decisions should not apply when agency bias is present).

43. See Friendly, *supra* note 42, at 1295-98 (proposing that individual interests at stake be evaluated in determining due process hearing requirements and stating that a deportation decision raises interests of the highest magnitude); see also *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936) ("[T]o say that . . . [agency] findings of fact may be made conclusive where constitutional rights of liberty and property are involved . . . is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."); Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1149-53 (1984) [hereinafter Verkuil, *Immigration Procedures*] (discussing high valuation of individual interests implicated by immigration, specifically denaturalization, deportation, and refugee, decisions).

44. See *infra* text accompanying notes 79-129.

## III. SELECTIVE USE OF THE PLAIN MEANING APPROACH

Dean Guido Calabresi's *A Common Law for the Age of Statutes*<sup>45</sup> marked a renaissance in academic interest in the methods employed by courts in the interpretation of statutes.<sup>46</sup> The Supreme Court also has shown a renewed interest in the subject. Without attempting to analyze the voluminous commentary on the subject or articulate a general theory of statutory interpretation, this section outlines the contours of the ongoing debate within the Court.

In construing a statute, the Court in the past twenty years often has not limited itself to scrutinizing the relevant language, but frequently has delved into legislative history and purpose.<sup>47</sup> The stated hope often was to discern the "Congressional intent" behind the law's enactment in order to answer the interpretive question at hand.<sup>48</sup> At other times, however, the Court has interpreted the language of the statute literally and refused to explore further.<sup>49</sup> The Justices generally have been inattentive to whether the Court employed a consistent method of statutory

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45. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

46. See, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64-66 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1544-55 (1987); Sunstein, *supra* note 22, at 405. Indeed, a casebook, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 569-828 (1988), and a Department of Justice report, U.S. DEP'T OF JUSTICE OFFICE OF LEGAL POLICY, *REPORT TO THE ATTORNEY GENERAL—USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION* (1989), have been released on the subject. The debate within the Supreme Court about the proper mode of statutory interpretation even made the front page of the *New York Times*, see Robert Pear, *With Rights Act Comes Fight to Clarify Congress's Intent*, N.Y. TIMES, Nov. 18, 1991, at A1, and was the subject of Congressional hearings, see *Hearing before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Comm. on the Judiciary, Statutory Interpretation and the Uses of Legislative History*, 101st Cong., 2d Sess. (1990).

47. See, e.g., *United States v. Taylor*, 487 U.S. 326, 333 (1988) ("Because Congress employed somewhat broad and open-ended language [in the statute], we turn briefly to the legislative history . . ."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-43 (1987) (employing numerous devices, including legislative history, congressional purpose, and international law, in interpreting Refugee Act).

48. See, e.g., *McCarthy v. Madigan*, 112 S. Ct. 1081, 1089 (1992) ("Turning first to congressional intent . . ."); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985) ("[O]ur task is to ascertain Congress' intent in enacting the federal statute at issue."); see also *Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.) ("In construing these laws, it . . . [is] the duty of the court to effect the intention of the legislature."); POSNER, *supra* note 22, at 286-93 (advocating similar intent theory). But see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325-32 (1990) (summarizing arguments challenging intentionalism). Professor Aleinikoff aptly refers to this as the "archeological" approach. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988).

49. See, e.g., *United States v. Locke*, 471 U.S. 84, 109-10 (1985) (interpreting literally the Federal Land Policy and Management Act of 1976); *Griffin v. Oceanic Contractors, Inc.*, 458

interpretation.<sup>50</sup>

Exhibiting similar ambivalence, the Rehnquist Court has argued about the proper approach to statutory interpretation. Some Justices, particularly Justices Stevens<sup>51</sup> and Blackmun,<sup>52</sup> and sometimes Justice White,<sup>53</sup> tend to follow the more traditional approach of considering the law's legislative history as well as the purpose underlying its enactment. Less inclined than other Justices to find the meaning of the text to be "plain," this group weighs all available evidence in interpreting a statute.

In stark contrast, Justice Scalia is an outspoken advocate of the "plain meaning" approach, a descendant of the literalist method. He interprets statutes by the plain meaning of the text, which may be clarified by other provisions of the law.<sup>54</sup> Justice Scalia rejects attempts to discern Congressional "intent" through consideration of sources other than the text of the statute.<sup>55</sup> This view is consistent with his sometimes strict

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U.S. 564, 574-77 (1982) (interpreting literally statute obligating owner of vessel to pay wages to seaman).

50. See Eskridge, *Overriding Supreme Court Decisions*, *supra* note 22, at 373-77 (concluding from empirical study that during 1977-83 Terms, Court took eclectic approach to statutory interpretation with preference for plain meaning approach); see also Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 730 (1987) ("[C]ourts do not adhere to a maxim of literalism with enough consistency to grant it any sort of overriding legitimacy as a neutral principle."); David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 388-95 (1992) (discussing Court decisions reflecting inconsistent use of legislative history); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation*, 70 TEX. L. REV. 1073, 1136 (1992) (empirical study covering period of 1890 to 1990 reaching similar conclusion as Professor Eskridge).

51. See, e.g., *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2055 (1992) (Stevens, J., dissenting) (claiming that Court failed to "carefully examin[e] the language, structure, and history" of statute); *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 834 (1992) (Stevens, J., dissenting) (advocating interpretation of Voting Rights Act based on its "central purpose"); see *infra* text accompanying notes 75-77.

52. See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2604 (1992) (Blackmun, J., dissenting) (criticizing plain meaning approach taken by majority and claiming that Court should weigh "history, structure, and policies," as well as context of law in its interpretation); see *infra* text accompanying notes 360-70 (discussing Justice Blackmun's dissent in *Ardestani v. INS*, 112 S. Ct. 515 (1991)).

53. See *infra* text accompanying notes 66-68 (discussing *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991)).

54. See, e.g., *Morales*, 112 S. Ct. at 2036 (Scalia, J.); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123-27 (1989) (Scalia, J.); *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (Scalia, J.).

55. See, e.g., *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 693-94 (1992) (Scalia, J.) (following plain meaning of statute even though result was in conflict with federal Indian policy); *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.") (citations omitted); see also *Hirschey v. Fed-*

adherence to separation of powers principles:<sup>56</sup> Congress passes laws, not legislative history or purposes.<sup>57</sup> Besides the absence of bicameral approval, legislative history is subject to scorn from plain meaning adherents because it is easily manipulated for partisan ends.<sup>58</sup> Deviation from the statutory text is appropriate only when a literal interpretation would render an "absurd" result.<sup>59</sup> Along with Justice Scalia, Chief Justice

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eral Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring in judgment) (stating similar views); Scalia, *supra* note 31, at 517 (arguing that "quest for . . . legislative intent is probably a wild-goose chase [because] Congress [probably] didn't think about the matter at all").

56. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 425-26 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 654, 709-10 (1988) (Scalia, J., dissenting).

57. See, e.g., *Republic of Arg. v. Weltover, Inc.*, 112 S. Ct. 2160, 2168 (1992) (Scalia, J.); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) (Scalia, J.); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring in judgment); *United States v. Taylor*, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring in part); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 324-25 (1988) (Scalia, J., concurring in part, dissenting in part); see also *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part, concurring in judgment) ("[O]nly a small proportion of the Members of Congress read either one of the Committee Reports in question . . . . [T]he cases were inserted, at best by a committee staff member on his or her own initiative, and at worst . . . at the suggestion of a lawyer-lobbyist . . . ."); Antonin Scalia, *Speech on Use of Legislative History*, 12-18 (delivered between fall, 1985 and spring, 1986 at various law schools) (on file with North Carolina Law Review Association) (arguing against use of legislative history in interpreting statutes).

Justice Scalia's rejection of legislative history has been much discussed and almost as frequently questioned. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861-74 (1992); Eskridge, *New Textualism*, *supra* note 22, at 666-85; Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 452-69 (1988); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1135-38 (1992); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 282-86 (1990); Zeppos, *supra* note 22, at 1303-35; see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 262-69 (1990) (discussing "the plain meaning fallacy"); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 322 (1990) (arguing that because some politics is a desired part of administrative decisionmaking, legislative history should appropriately be considered by agencies interpreting statutes). For an interesting discussion of how Justice Scalia's formalist approach to the interpretation of texts may have been influenced by his father, a Romance Linguistics professor, and by his Catholic upbringing, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309-20 (1990).

58. See Slawson, *supra* note 50, at 383-84; see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1982) (quoting Judge Leventhal's observation that use of legislative history is similar to "looking over a crowd and picking out your friends").

59. See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989); *Green*, 490 U.S. at 527 (Scalia, J., concurring in judgment).

The Supreme Court, after transmitting to Congress an amendment to a Federal Rule of Civil Procedure with an obviously erroneous cross reference to a non-existent subsection of a rule, might find it necessary to invoke the absurdity canon to rescue its own handiwork. See



Rehnquist,<sup>60</sup> Justices Kennedy,<sup>61</sup> Thomas,<sup>62</sup> and sometimes O'Connor<sup>63</sup> and Souter,<sup>64</sup> follow the plain meaning approach.

Of course, plain meaning interpretation is not the exclusive method employed by the Rehnquist Court. For myriad reasons, including interest in, or importance of, the issues to the Court, some statutory issues may not be relatively easily resolved through plain meaning interpretation. Consequently, one would expect there to be some inconsistency in

Gene R. Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85, 86-93 (1991) (describing error and correction).

60. See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980).

61. See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596-97 (1992); *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1401-02 (1992); *Public Citizen*, 491 U.S. at 470-71 (Kennedy, J., concurring).

62. See, e.g., *Robertson v. Seattle Audobon Soc'y*, 112 S. Ct. 1407, 1413-14 (1992); *Holywell Corp. v. Smith*, 112 S. Ct. 1021, 1025-27 (1992); *Molzof v. United States*, 112 S. Ct. 711, 715 (1992); see also *United States v. R.L.C.*, 112 S. Ct. 1329, 1341-42 (1992) (Thomas, J., concurring in part, concurring in judgment) (criticizing plurality for considering legislative history). For example, in disregarding a canon of statutory construction that "courts should disfavor interpretations of statutes that render language superfluous" and refusing to consider legislative history, Justice Thomas emphasized:

[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

*Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted); see also *infra* text accompanying notes 371-76 (discussing selective use of canons by Rehnquist Court).

63. See *infra* text accompanying notes 337-59 (discussing Justice O'Connor's opinion for Court in *Ardestani v. INS*, 112 S. Ct. 515 (1991)). But see *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2382 (1992) (O'Connor, J.) ("To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute."') (citations omitted); *infra* notes 360-61 and accompanying text (discussing *Sullivan v. Hudson*, 490 U.S. 877 (1989)).

64. See, e.g., *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1633-40 (1992). Justice Souter, however, is willing in some circumstances to consider legislative history, see, e.g., *United States v. R.L.C.*, 112 S. Ct. 1329, 1334-38 (1992) (Souter, J.) (plurality opinion), and the common law, see, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1349 (1992), in interpreting statutes. Indeed, he and Justice Scalia have debated the propriety of looking to legislative history in a manner suggesting that Justice Souter may not belong in the plain meaning camp at all. Compare *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109 n.8 (1992) (plurality opinion) (acknowledging Justice Scalia's criticism of use of legislative history and claiming that many, including Justice Frankfurter, relied on it in interpreting statutes) with *id.* at 2111 (Scalia, J., concurring in judgment) (criticizing reliance on legislative history and noting that the plurality "resorts to that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history"). For a general examination of Justice Souter's opinions interpreting statutes as a New Hampshire Supreme Court Justice, see William S. Jordan, III, *Justice David Souter and Statutory Interpretation*, 23 U. TOL. L. REV. 491, 495-530 (1992).

the Court's interpretive approach, and there is.<sup>65</sup> Consider two examples from the October, 1990 term.

In *Wisconsin Public Intervenor v. Mortier*,<sup>66</sup> the Court, in an opinion by Justice White, held that the Federal Insecticide, Fungicide and Rodenticide Act does not preempt the regulation of pesticides by local governments. While finding the legislative history on the subject not to be dispositive,<sup>67</sup> Justice White emphasized that

*[a]s for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.*<sup>68</sup>

Although agreeing that local law was not preempted, Justice Scalia argued that the plain meaning of the statute answered the question, thereby ending the inquiry.<sup>69</sup> It was irrelevant that the legislative history, in his view, clearly favored the conclusion that federal law did preempt local regulation.<sup>70</sup> He further proclaimed that "extensive use [of legislative history was] a very recent phenomenon."<sup>71</sup>

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65. See, e.g., *Thompson/Center Arms Co.*, 112 S. Ct. at 2110 (sharply divided Court in which no one opinion commanded majority, but five Justices agreed that statute was sufficiently ambiguous to require application of "rule of lenity"); see also Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815-32 (1982) (arguing that, as suggested by Arrow's Theorem, inconsistency in Court's decisions is inevitable result of institutional nature of Court, particularly voting by Justices); *supra* text accompanying notes 34-40 (recognizing similar phenomenon with respect to *Chevron* deference). Compare *INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 555-58 (1991) (deviating from plain meaning approach) with *INS v. Elias-Zacarias*, 112 S. Ct. 812, 814-17 (1992) (following plain meaning approach); compare *Ardestani v. INS*, 112 S. Ct. 515, 520-21 (1991) (interpreting literally the Equal Access to Justice Act) with *Sullivan v. Hudson*, 490 U.S. 877, 887-88 (1989) (interpreting same act in light of statute's purpose).

66. 111 S. Ct. 2476 (1991).

67. See *id.* at 2484.

68. *Id.* at 2484-85 n.4 (emphasis added) (citations omitted).

69. See *id.* at 2490 (Scalia, J., concurring in judgment).

70. See *id.* at 2487 (Scalia, J., concurring in judgment).

71. *Id.* at 2490 (Scalia, J., concurring in judgment) (citing Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 284-90 (1987) (showing increased use of legislative history in interpretation of statutes over time through statistical study of Court's decisions from 1938 to 1979), and Wald, *supra* note 58, at 196-97).

In contrast, the Court in *West Virginia University Hospitals, Inc. v. Casey*,<sup>72</sup> in an opinion by Justice Scalia, refused to consider legislative history and statutory purpose and held that the Civil Rights Attorney's Fees Awards Act of 1976,<sup>73</sup> which permits the award of "a reasonable attorney's fee" in civil rights cases, did not permit the recovery of expert witness fees. As one would expect in an opinion written by a plain meaning devotee, the majority emphasized that

[t]he best evidence of . . . purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.<sup>74</sup>

Finding that the legislative history and statutory purpose mandated a contrary result, Justice Stevens dissented.<sup>75</sup> He pointed out that Congress had been forced to "overrule" a number of the Court's plain meaning decisions<sup>76</sup> and further contended that

[i]n the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but *we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it "to take*

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72. 111 S. Ct. 1138 (1991).

73. 42 U.S.C.A. § 1988 (West 1981 & Supp. 1991). Ironically, Congress passed the law in response to the Supreme Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), which limited the federal courts' power, absent statutory authorization, to award attorneys' fees to a prevailing party. See S. REP. NO. 1011, 94th Cong., 2d Sess. 4 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5911.

74. *Casey*, 111 S. Ct. at 1147 (citations omitted).

75. See *id.* at 1149, 1151-53 (Stevens, J., dissenting). Justices Marshall and Blackmun joined Justice Stevens in his dissent. *Id.* at 1149 (Stevens, J., dissenting); cf. John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 21-38 (1992) (criticizing original intent approach to constitutional interpretation).

76. See *Casey*, 111 S. Ct. at 1153-55 (Stevens, J. dissenting) (listing six instances); see also Eskridge, *Overriding Supreme Court Decisions*, *supra* note 22, at 347 (empirical study showing that in over 25% of cases in which Congress acted to "override" Supreme Court decisions from 1967 to 1990, it was done to counter a plain meaning interpretation of statute). Indeed, Congress "overruled" *Casey* in part. See Civil Rights Act of 1991, Pub. L. No. 102-66, § 113, 105 Stat. 1071, 1079 (1991); see also T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey*, and *Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 706-13 (1992) (arguing that *Casey* incorrectly ignored context and purpose of statute). The Civil Rights Act of 1991, as illustrated by its language and its legislative history, responded to a number of Supreme Court civil rights decisions, particularly *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which overruled well-settled precedent. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991); H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 23-45 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 561-83.

*the time to revisit the matter*" and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.<sup>77</sup>

In sum, although evidence of growing adherence to plain meaning interpretation by the Rehnquist Court exists, the approach has been employed selectively. As we shall see, the Court continued this practice last term.<sup>78</sup>

#### IV. DEFERENCE, PLAIN MEANING, AND OTHER RESPONSES OF THE REHNQUIST COURT TO THE "CASELOAD CRISIS" IN THE FEDERAL COURTS

The development of the deference and plain meaning doctrines is emblematic of the Rehnquist Court's approach to bodies of law spanning the legal spectrum. Besides increasing in number in recent years, agency decisions frequently raise complex issues that, if carefully scrutinized by a reviewing court, would require immersion in bulky records.<sup>79</sup> *Chevron* deference effectively creates a presumption in favor of the agency. The presumption allows appellate courts, including the Supreme Court, to dispose of complicated agency decisions easily.<sup>80</sup> By tending to ease the rigors of judicial review, the presumption may reduce the heavy caseload of the federal courts. As Justice Scalia has observed, "*Chevron* . . . replaced [a] statute-by-statute evaluation (*which was assuredly a font of un-*

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77. *Casey*, 111 S. Ct. at 1155 (Stevens, J., dissenting) (emphasis added) (footnote omitted); see also *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1150 & n.1 (1992) (Stevens, J., concurring in judgment) ("Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history" which "helps to illuminate [statutory] purposes.") (footnote omitted); John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1381 (1992) ("If you are desperate, or even if you just believe it may shed some light on the issue, consult the legislative history.").

78. See *infra* text accompanying notes 213-449.

79. See Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 643 (1986) (noting "staggering volume of claims decided by" administrative agencies causing "delay and expense" and adding thousands of "cases to the workload of" federal courts); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 770-71 (1983) (observing "increasingly technical, complex nature" of agency decisions reviewed by courts of appeals and that "[m]any of these time-consuming cases involve records with thousands of pages, multiple issues, and numerous parties").

80. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) ("*Chevron* . . . can be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy."); see also Jonathan R. Macey, *Separated Powers and Positive Political Theory*, 80 GEO. L.J. 671, 680 (1992) ("[T]he standard of judicial deference reflected in *Chevron* may be consistent with the public interest because it helps to limit the delays often associated with judicial review of agency rulemaking.").

*certainty and litigation*) with an across-the-board presumption that, in case of ambiguity, agency discretion is meant."<sup>81</sup>

Similarly, although plain meaning statutory interpretation arguably creates clearer, more predictable rules,<sup>82</sup> it may be attractive to the Rehnquist Court for other reasons infrequently articulated. In response to the increase in the federal judicial workload, some Justices apparently desire rules that not only discourage litigation, but also avoid requiring judges to become experts in esoteric statutory schemes. By limiting inquiry to the statutory language, a plain meaning rule expedites the Court's interpretive process, reduces conflict among Justices, and facilitates decision in a set of cases perceived to be mundane or trivial by the decisionmakers.<sup>83</sup> Consistent with this theory, Chief Justice Rehnquist, then an Associate Justice, advocated that a separate court be established to relieve an overworked Supreme Court of the burden of interpreting federal statutes.<sup>84</sup>

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81. Scalia, *supra* note 31, at 516 (emphasis added).

82. See *Dewsnup v. Timm*, 112 S. Ct. 773, 787-88 (1992) (Scalia, J., dissenting). As Justice Scalia has emphasized, deviation from plain meaning interpretation "renders these principles less secure and the certainty they are designed to achieve less attainable. When a seemingly clear provision can be pronounced 'ambiguous' . . . , and when the assumption of uniform meaning is replaced by 'one-subsection-at-a-time' interpretation, innumerable statutory texts become worth litigating." *Id.* (Scalia, J., dissenting); see also *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643 (1992) (Scalia, J.) (rejecting multiplier in awarding attorneys' fees under environmental statute in part to "avoid[] burdensome satellite litigation" in which fee award would be "more unpredictable, and hence more litigable"); *FTC v. Tioro Title Ins. Co.*, 112 S. Ct. 2169, 2180 (1992) (Scalia, J., concurring) (noting that legal "standard [adopted by Court] will be a fertile source of uncertainty and (hence) litigation"); cf. *Doggett v. United States*, 112 S. Ct. 2686, 2700 (Thomas, J., dissenting) ("Our constitutional law has become ever more complex in recent decades. That is, in itself, a regrettable development, for the law draws force from the clarity of its command and the certainty of its application.").

83. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 254-55; Strauss, *supra* note 80, at 1095, 1117; see also Scalia, *supra* note 57, at 14 (claiming that one "disadvantage of legislative history . . . is the inordinately high expense of its use" that "on a frequently amended statute can take hundreds of hours of research"). This economy and efficiency argument sometimes shifts its focus to the costs to lawyers and clients of reviewing legislative history in litigating a law's interpretation. See U.S. DEP'T OF JUSTICE OFFICE OF LEGAL POLICY, *supra* note 46, at 52; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377.

84. See Justice William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11-12 (1986) [hereinafter Rehnquist, *Changing Role*] (advocating that Supreme Court surrender to national court of appeals jurisdiction over "run-of-the-mine statutory construction cases"). In a related vein, Justice Scalia lamented that, unlike the past, the federal courts presently are filled with "'minor' and 'routine' cases about 'mundane' matters of 'less import' or even 'overwhelming triviality.'" Marc S. Galanter, *The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 922 (quoting Justice Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Bar Council of Bar Presidents, New Orleans, LA. (Feb. 15, 1987)); see also Robert H. Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231, 237 (1976) (referring to the

As this explanation of the deference and plain meaning doctrines might suggest, the Court often resorts to default principles that, over the long run, operate to reduce the workload of the federal judiciary by easing disposal of, and sometimes eliminating, the "ordinary" and "trivial" case.<sup>85</sup> Ideological forces, such as the individual Justice's views concerning federalism, separation of powers, and the federal judiciary as a policymaker, obviously influence its results.<sup>86</sup> Nonetheless, the overall impact of the Court's doctrinal approaches in a variety of substantive areas should not be ignored. This is particularly true in light of Chief Justice Rehnquist's long campaign to convince Congress to restrict federal jurisdiction in order to remedy the "crisis" of an increasingly unmanageable caseload.<sup>87</sup> This campaign and the concomitant ascendance

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"enormous amount of litigation" in federal courts that raise issues which are "in large measure legal trivia").

85. There is, of course, enough play in the joints so that the Court may remove a case from the default category. That helps explain some of the inconsistencies in the Court's deference and plain meaning decisions. See *supra* text accompanying notes 34-40 and 66-77.

86. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 52-129 (1990) (discussing such ideological factors).

87. See, e.g., WILLIAM H. REHNQUIST, 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3, 6-7 (1992) [hereinafter REHNQUIST, 1991 REPORT] (discussing "caseload crisis [in] the federal courts" and advocating limitations on diversity and other jurisdiction, habeas corpus "reforms" to "eliminat[e] repetitive and time-intensive demands on the federal courts," and "self-restraint in adding new federal causes of action"); Paul Marcotte, *Rehnquist: Cut Jurisdiction*, A.B.A. J., April 1989, at 22 (reporting that in a speech to the ABA House of Delegates, Chief Justice Rehnquist stated that because the system is overloaded, Congress should restrict federal jurisdiction); Rehnquist, *Changing Roles*, *supra* note 84, at 1 (discussing "crisis" of overcrowded Supreme Court docket); William H. Rehnquist, *A Plea for Help: Solutions to the Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 2 (1984) [hereinafter Rehnquist, *A Plea for Help*] (expressing concern with caseload of federal courts).

Chief Justice Rehnquist specifically has warned:

Unless actions are taken to reverse current trends, or slow them down considerably, the federal courts of the future will be dramatically changed. . . . Judges will have less time to spend on individual cases; bureaucratization and increased management strictures will leave the judges less freedom to exercise personal judgment. These circumstances will lead judges to have less of a sense of personal responsibility and accountability for the work they produce. Unless checked, the result will be a degradation in the high quality of justice the nation has long expected of the federal courts.

REHNQUIST, 1991 REPORT, *supra*, at 3. Increasing workload is a consistent theme in Chief Justice Rehnquist's annual reports on the federal judiciary. See *id.*; WILLIAM H. REHNQUIST, 1990 YEAR-END REPORT ON THE FEDERAL JUDICIARY (1991), reprinted in 137 CONG. REC. S1331 (daily ed. Jan. 30, 1991) [hereinafter REHNQUIST, 1990 REPORT]; WILLIAM H. REHNQUIST, 1989 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-4 (1990) [hereinafter REHNQUIST, 1989 REPORT]; WILLIAM H. REHNQUIST, 1988 YEAR-END REPORT ON THE JUDICIARY 1-3 (1989); WILLIAM H. REHNQUIST, 1987 YEAR-END REPORT ON THE JUDICIARY 4, 7 (1988); WILLIAM H. REHNQUIST, 1986 YEAR-END STATEMENT 5-6 (1987). He has gone so far as to suggest a study of replacing mandatory review by courts of appeals of lower court decisions with discretionary review similar to the system in place in the Supreme Court.

of the deference and plain meaning doctrines hardly seem coincidental.

In addition to Chief Justice Rehnquist, prominent observers<sup>88</sup> and the executive branch<sup>89</sup> have been abuzz for a number of years about the so-called "litigation explosion" and the need for reform. They claim that, unless steps are taken to reduce significantly the workload, the quality of the federal judiciary and its work product inevitably will diminish.<sup>90</sup> Such concerns stand in stark contrast to the one-time conventional wisdom that easy access to the federal courts,<sup>91</sup> and the accompanying increase in litigation, particularly reform-minded public law litigation,<sup>92</sup> represented a positive evolution in the American judicial system. One legacy of the Warren Court, which generally expanded the scope of constitutional and other rights, was an increase in litigation.<sup>93</sup> On the other hand, the Rehnquist Court generally has limited rights, thereby tending

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See Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, Kastenmeier Lecture at the University of Wisconsin-Madison 27-28 (Sept. 15, 1992) (on file with North Carolina Law Review Association).

88. See, e.g., REPORT OF THE FED. COURTS STUDY COMM. 4-10 (1990) (describing "crisis" in federal court system due to trebling in caseload between 1958 and 1988); POSNER, *supra* note 22, at 59-166 (claiming that absent improvements, rapid growth in federal court caseload to "crisis" proportions will harm justice system). But see Galanter, *supra* note 84, at 946 (examining period 1960 to 1986 and explaining that while there has been an increase in court filings of certain categories of lawsuits, filings in other categories have fallen significantly); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1909 (1989) (asserting that "the truth about the 'litigation explosion' is that it is a weapon of perception, not of substance").

Acknowledging some need for change, Congress passed the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 1990 U.S.C.A.N. (104 Stat.) 5089, which, among other changes, implemented some relatively uncontroversial recommendations of the Federal Courts Study Committee. See John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 748, 763, 774-75 (1991). Congress, however, has declined to enact more far-reaching recommendations, including a call to curtail significantly federal jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332 (1988), which some estimate would reduce the federal caseload by as much as 25%. See REPORT OF THE FED. COURTS STUDY COMM., *supra*, at 38-42.

89. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1, 9 (1991) (report of committee chaired by Vice President Quayle) (concluding that increase in litigation adversely affected economy and proposing reforms to "reduc[e] unnecessary burdens on federal courts").

90. See *supra* notes 88-89 (citing sources).

91. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (Clark, J.) (noting the liberal pleading requirements under the "new rules of civil procedure").

92. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (discussing rise in public law litigation).

93. See REPORT OF THE FED. COURTS STUDY COMM., *supra* note 88, at 5 ("The causes [for the increase in federal court caseload] are not fully understood but certainly include the continued growth of federal law and in particular the creation of many new federal rights both by Congress and by judicial interpretation . . ."); POSNER, *supra* note 22, at 80-81 (noting that part of "litigation explosion" in federal courts was due to judicial creation of "private rights of

to reduce litigation.<sup>94</sup> One important distinction between these two Courts, woven into more frequently discussed ideological differences, is their respective views about the nature, value, and costs of litigation.

A separate and somewhat independent factor also may be at work in moving the Rehnquist Court to default principles. As some commentators have posited,<sup>95</sup> the federal judiciary simply cannot understand with sufficient detail the myriad, particularized statutory schemes passed in the post-New Deal era's "orgy of statute making."<sup>96</sup> In light of their workload and the ever-growing number of laws, lower court judges may lack the time or inclination to consult lengthy legislative histories to learn in detail the policies and purposes underlying the teeming array of complex, technical statutes passed by Congress.<sup>97</sup>

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action under federal statutes" and the Supreme Court's "broad interpretations of" various statutes and the Constitution).

94. See POSNER, *supra* note 57, at 218 (noting that the more liberal Warren Court generally expanded rights, while the more conservative Burger and Rehnquist Courts usually narrowed rights). The Rehnquist Court's pruning of civil rights claims under § 1983 is a good example. See 42 U.S.C. § 1983 (1988); see, e.g., *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1071 (1992) (refusing to allow § 1983 claim based on fatal injury to municipal employee); *Mireles v. Waco*, 112 S. Ct. 286, 289 (1991) (*per curiam*) (holding that immunity protected state court judge who allegedly ordered police officers to assault public defender); see also *Smith v. Wade*, 461 U.S. 30, 91 (1983) (Rehnquist, J., dissenting) ("The staggering effect of § 1983 claims upon the workload of the federal courts has been decried time and again. The torrent of frivolous [§ 1983] claims . . . threatens to incapacitate the judicial system's resolution of claims where true injustice is involved; those claims . . . are in a very real danger of being lost in a sea of meritless suits.").

The concern with litigation may have influenced a relatively conservative Court to refuse to extend property rights in a manner that might have given rise to increased claims based on the "takings" clause of the Fifth Amendment. See *Yee v. City of Escondido*, 112 S. Ct. 1522, 1534 (1992); cf. *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2336 (1992) (rejecting constitutional challenge to California's Proposition 13, a potential source of many challenges to numerous provisions of federal and state tax laws, despite resulting gross disparities in property taxes paid on similar properties). But cf. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2890-92 (1992) (holding that absolute ban on development that makes real property worthless might constitute a "taking").

95. See, e.g., Schauer, *supra* note 83, at 253-54.

96. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977). It is therefore understandable why, as perusal of a recent issue of the *Supreme Court Review* indicates, academics frequently find it easy to criticize the Court's interpretation of those laws. See, e.g., John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 208-09 (arguing that Supreme Court grossly misapplied the law in ERISA litigation).

97. See Schauer, *supra* note 83, at 253-54 (arguing that increased complexity of law necessitates reliance on canons of construction); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 658-59 (1992) (The Court's "increasing reliance on the canons [of statutory construction] is an inevitable consequence of the increasing technical complexity of the law. The justices must justify their decisions in some way. Their inability to master the details of every area of law that comes before them makes reliance on a generic decision-generating device such as the canons inevitable.").



Similarly, the law and facts involved in reviewing agency action frequently are so complicated as to render it prohibitively difficult and time-consuming to evaluate the agency's decision. While the statutes administered by agencies implicate the same costs presented in interpreting other laws, the technical basis for many agency decisions further complicates matters. Deference under such circumstances is roughly consistent with the traditional view that judges should not substitute their judgment for that of the "expert" agency.<sup>98</sup>

By establishing firm presumptions, the Supreme Court may be indirectly assisting in docket management.<sup>99</sup> Once a case is placed in the "agency decision" category, *Chevron's* logic means that deference generally is warranted. Lengthy agency proceedings, as well as the complex, technical basis for some rulings, may be given short shrift. The specifics of the matter under scrutiny often are of marginal relevance. Time may be saved and thus cases decided in an expeditious manner. Similarly, the plain meaning rule obviates the need for the courts to delve deeper than the black letter of the law in question. To decide a significant number of cases, the lower courts must learn nothing more about a statute than the literal language. Broader purposes and policies or lengthy legislative histories need not be consulted.

Judges concerned with efficiency prompted by the case management movement<sup>100</sup> probably would be eager for a quick, yet apparently objective, method for disposing of the less interesting, less value-laden, and often complicated portion of their docket.<sup>101</sup> Grand ideological debate simply does not center, for example, on whether a Federal Rule of Civil Procedure allows a law firm to be sanctioned for a partner's misconduct,<sup>102</sup> or whether the Secretary of the Army may decline to issue a permit to build an addition to a coastline unless a state agrees that construction will be deemed as not altering the location of the federal-state

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98. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (asserting that deference to agency interpretations is the proper role of the judiciary); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645-47 (1990) (recognizing expertise of agencies); see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10-12 (1938) (claiming that governmental regulation of industry should not be based on politics).

99. Bright line rules also tend to discourage judicial policymaking. See Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" Legal Process*, 12 *CARDOZO L. REV.* 1597, 1619 (1991).

100. See generally Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982) (discussing the propriety of case management by the federal judiciary).

101. See Macey & Miller, *supra* note 97, at 671 (noting that statutory "canons provide useful tools for judges who have no views on a particular issue").

102. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123-24 (1989) (interpreting Federal Rule of Civil Procedure 11 in accordance with plain meaning principles).

boundary.<sup>103</sup> One also might expect courts with fairly strong ideological inclinations to pursue doctrines that facilitate quicker resolution of the ordinary case. To focus on the cases raising significant ideological issues, a judge must minimize time spent on the run-of-the-mill case.

Let us consider this hypothesis for a moment. The Supreme Court accepted fewer cases for review in the October 1991 term than in the recent past.<sup>104</sup> Some of these cases, such as the relatively large number of bankruptcy<sup>105</sup> and immigration<sup>106</sup> decisions, clearly lack the ideological spark generated by such volatile issues as First Amendment rights, abortion, and affirmative action. Assuming some rationality in case selection,<sup>107</sup> the Court's decision in these cases may represent an effort to expand the deference and plain meaning doctrines to these isolated substantive areas in order to limit litigation and appeals, ease the decision-making process under complicated statutory and regulatory regimes, and reduce judicial workload.<sup>108</sup> If lower courts must presumptively defer to administrative action, fewer individuals will pursue judicial review of

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103. See *United States v. Alaska*, 112 S. Ct. 1606, 1610, 1619 (1992) (applying *Chevron* and deferring to agency interpretation of Rivers and Harbors Appropriation Act of 1899).

104. See *supra* text accompanying note 4. The Court generally has discretion to decide which cases to review, see 28 U.S.C. § 1254 (1988), a power it often exercises to resolve a conflict between decisions of the courts of appeals. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 277-79 (1991) (concluding that circuit split is a significant factor in determining whether Court grants certiorari). Obviously, a conflict between courts does not necessarily mean that the issue raised is interesting or important.

105. See *infra* note 115 (citing bankruptcy cases). This may have something to do with the Chief Justice's observations about the significant increase in bankruptcy filings in recent years. See REHNQUIST, 1991 REPORT, *supra* note 87, at 11 (noting 23% increase in personal and 7% increase in business bankruptcy filings in 1991); REHNQUIST, 1990 REPORT, *supra* note 87 (noting 14% increase in personal and 3% increase in business bankruptcy filings in 1990); REHNQUIST, 1989 REPORT, *supra* note 8, at 3 ("The more complex and time-consuming civil cases continued to increase. In bankruptcy courts, filings rose by more than 8 percent to a record level . . .").

106. See *infra* text accompanying notes 213-449 (discussing Court's recent immigration decisions). The Supreme Court also granted certiorari in two immigration cases to be decided next term. See *Catholic Social Servs., Inc. v. Thornburgh*, 956 F.2d 914, 921-23 (9th Cir.) (rejecting the INS's interpretation of amnesty provisions of Immigration Reform and Control Act), *cert. granted*, 112 S. Ct. 2990 (1992); *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352, 1362-64 (9th Cir. 1991) (en banc) (invalidating INS regulation that required detention of immigrant children unless adult relative or legal guardian assumed custody), *cert. granted*, 112 S. Ct. 1261 (1992).

107. For a recent study of the certiorari process that throws doubt on this assumption, see PERRY, *supra* note 104, at 216-77 (noting difficulties in evaluating whether Court will grant certiorari in an individual case and suggesting that Court may not pay as careful attention to certiorari decisions as might be expected).

108. See Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 321-22 (1989) (arguing that some of Court's decisions are influenced by quantity of litigation in federal courts).

agency decisions.<sup>109</sup> Similarly, if the language of the statute almost always dictates its interpretation, fewer litigants will file lawsuits, or base appeals, on extra-textual materials.<sup>110</sup>

In civil cases, the Rehnquist Court appears bent on establishing and following rules that tend to discourage litigation. For example, the Court has imposed limits on standing and other justiciability doctrines that effectively reduce federal litigation.<sup>111</sup> This is not an entirely new phenomenon. For example, the Burger Court stressed that, under the deferential clearly erroneous standard of review, district court fact findings rarely should be reversed and thus are less likely to be appealed.<sup>112</sup>

The Court's jurisprudence in particular substantive areas also shows its inclination to reduce litigation. The Court, for example, recently narrowed the claims that plaintiffs may bring under certain federal securities laws,<sup>113</sup> which some (including then-Justice Rehnquist) have claimed are

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109. See *supra* text accompanying notes 23-44; see also Maurice Rosenberg, *Standards of Review*, in *RESTRUCTURING JUSTICE* 30, 30-31 (Arthur D. Hellman ed., 1990) (assessing impact of review standards in deterring hopeless appeals to Court of Appeals for the Ninth Circuit).

110. See *supra* text accompanying notes 45-78. Justice Scalia highlighted this point in concurring in the Court's unanimous rejection of legislative history and policy arguments that conflicted with the bankruptcy code's "plain meaning":

It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a Court of Appeals), with respect to a statute utterly devoid of language that could remotely be thought to [support the position advocated]. Since there was here no contention of a "scrivener's error" producing an absurd result, *the plain text of the statute should have made this litigation unnecessary and unmaintainable.*

*Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring) (emphasis added); see also *Patterson v. Shumate*, 112 S. Ct. 2242, 2250-51 (1992) (Scalia, J., concurring) (making similar comments).

111. See, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146 (1992) (holding that environmental organizations lacked standing); *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185, 3194 (1990) (same); see also Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 56-60 (1982) (discussing how limits on standing and other doctrines tend to reduce public law litigation); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Note on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 74-75 (1984) (claiming that Burger Court misused standing and equitable restraint doctrines in effort to restrict public law litigation).

112. See *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982) (holding that discriminatory intent is a finding of fact, not a legal conclusion, and is only to be disturbed if clearly erroneous). But cf. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984) (holding that the constitutional requirement of "actual malice" in libel cases was reviewable *de novo*).

113. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 (1991) (applying relatively short limitations period to implied right of action under § 10(b) and Rule 10b-5 of Securities Exchange Act); *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2755, 2764-66 (1991) (holding that shareholder failed to establish causation of damages by misrepresentations and omissions necessary to establish implied right of action under § 14(a) and Rule 14a-9 of Securities Exchange Act).

an abusive form of litigation instigated by plaintiffs' attorneys seeking to secure fees from settlements.<sup>114</sup> It also often has interpreted the bankruptcy code by focusing on the plain meaning of a hyper-technical statute, disregarding broader bankruptcy policies.<sup>115</sup> Similarly, ignoring the broader purposes underlying the intricate web of regulation, the Court has interpreted environmental laws by their plain meaning,<sup>116</sup> invoked *Chevron* to avoid the necessity of interpreting the law,<sup>117</sup> or limited environmental groups' standing to sue.<sup>118</sup>

A particularly telling example of an effort by the Court to reduce litigation through procedural doctrine is its series of Rule 11 decisions holding that district court judges have broad discretion in awarding sanctions and may be reversed only for abuse of that discretion.<sup>119</sup> Aside

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114. See generally John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669-70 (1986) (describing how "private attorney generals" enforce substantive law and how procedural rules that establish fee arrangements to compensate plaintiffs' attorneys foster this practice, which is especially common under federal anti-trust and securities laws). Chief Justice Rehnquist acknowledged a number of years ago that, because of the nuisance value of shareholder suits, a special potential exists for vexatious securities litigation. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975) (Rehnquist, J.).

115. See, e.g., *Patterson v. Shumate*, 112 S. Ct. 2242, 2246 (1992); *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1647-49 (1992); *Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992); *Union Bank v. Wolas*, 112 S. Ct. 527, 531-33 (1991). But cf. *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992) (noting that where text of statute is ambiguous, basic bankruptcy policies become important). See generally Charles J. Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 823-26 (1991) (discussing the Court's unprecedented interest in bankruptcy cases—16 cases were decided in Rehnquist's first five terms as Chief Justice—and arguing that plain meaning interpretation prevailed over bankruptcy policy).

116. See, e.g., *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1633-40 (1992).

117. See *supra* text accompanying notes 23-44.

118. See, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2135-40, 2146 (1992).

119. See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) ("[D]eference [to district court Rule 11 decisions] will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation."); see also *Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1077-78 (1992) (holding that district court could impose Rule 11 sanctions in a case in which it was later determined that the court lacked subject matter jurisdiction); *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2136 (1991) (holding that district court had "inherent power" to sanction litigant misconduct and that such sanctions are reviewed on appeal for abuse of discretion); cf. *Denton v. Hernandez*, 112 S. Ct. 1728, 1730-32 (1992) (holding that court of appeals incorrectly limited district court's power to dismiss complaint filed by prison inmates alleging homosexual rape by inmates and prison officials); *Zatko v. California*, 112 S. Ct. 355, 356 (1991) (per curiam) (denying *in forma pauperis* status to petitioners "who have repeatedly abused the integrity of our process through frequent frivolous filings"). A desire to screen

from affording great power to the district courts to halt litigation abuse, the deferential review standard necessarily reduces the number of appeals because putative appellants realize that the chances for success are minimal, thereby limiting "satellite litigation" over sanctions.<sup>120</sup> Again, this is consistent with the Berger Court's use of procedural doctrines to reduce litigation, such as the trilogy of decisions in 1986 that encouraged use of summary judgment to screen factually insufficient claims before trial.<sup>121</sup>

The Rehnquist Court's criminal decisions reflect similar trends. It has consistently limited the category of errors necessitating a new trial for a criminal defendant.<sup>122</sup> In severely restricting the right to habeas corpus, the Court often emphasizes the need to reduce what it characterizes as frivolous, duplicative, and wasteful litigation.<sup>123</sup> In a much publi-

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frivolous claims early in the process has led a number of courts to impose more exacting pleading standards on certain categories of actions, including civil rights and securities fraud suits. See generally Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440-44 (1986) (discussing this phenomenon). The Supreme Court recently granted certiorari to decide the propriety of this practice in a civil rights case. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1058 (5th Cir.), cert. granted, 112 S. Ct. 2989 (1992).

120. See *Cooter & Gell*, 496 U.S. at 404.

121. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986) (Rehnquist, J.); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986); see also 10A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D* § 2727, at 31 (Supp. 1992) ("Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials.") (footnote omitted). For a thoughtful analysis of how so-called "procedural" developments such as the summary judgment decisions have reduced access to the courts for minorities under the guise of promoting efficiency, see Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

122. See, e.g., *Arizona v. Fulminante*, 111 S. Ct. 1246, 1263-66 (1991) (holding that coerced confession was subject to harmless error rule on appeal and did not justify automatic reversal of conviction); see also *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2197 (1992) (holding that federal agents' kidnapping of Mexican citizen in Mexico did not bar exercise of criminal jurisdiction over person).

123. See, e.g., *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1718 (1992) (limiting habeas right by overruling precedent and emphasizing that "[f]ederal habeas litigation . . . places a heavy burden on scarce judicial resources, may give litigants incentives to withhold claims for manipulative purposes, and may create disincentives to present claims when evidence is fresh") (citations omitted); *id.* at 1719 (arguing that judicial economy is well served by the Court's new standard because "[i]t is hardly a good use of scarce judicial resources to duplicate fact-finding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings"); *McCleskey v. Zant*, 111 S. Ct. 1454, 1469 (1991) (emphasizing that "[f]ederal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes").

Before the recent judicially crafted limitations, Chief Justice Rehnquist strongly urged Congress to restrict the right to habeas corpus. See Neil A. Lewis, *4 Key Issues in Dispute on Bill to Fight Crime*, N.Y. TIMES, Nov. 27, 1991, at B8; Paul Marcotte, *Rehnquist: Cut Juris-*

cized death penalty case, the Court lifted a stay of a scheduled execution, even though a colorable constitutional claim never thoroughly analyzed or finally decided convinced lower court judges to issue numerous stays.<sup>124</sup>

Perhaps the best evidence supporting the docket-clearing thesis is the fact that some recent decisions are at odds with the dominant ideological tenants of the Rehnquist Court, yet are entirely consistent with a desire to curb so-called frivolous litigation. For example, in *Boyle v. United Technologies Corp.*,<sup>125</sup> the Court, in an opinion by Justice Scalia, held that federal common law preempted state law and barred suits against military contractors who manufactured products for the federal government. Because the Court acted as a policymaker, displaced state law, and "made" federal law, *Boyle* is seriously at odds with the Rehnquist Court's devotion to rigid federalism and separation of powers principles.<sup>126</sup> The decision, however, is entirely consistent with concerns

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diction, A.B.A. J., Apr. 1989, at 22, 22-23; see also *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 94-121 (1971) (statement of Assistant Attorney General Rehnquist advocating restrictions on federal habeas corpus). He went so far as to appoint a committee, headed by retired Justice Powell, that recommended statutory amendments to deal with the "unnecessary delay and repetition" and "last-minute litigation" in habeas corpus capital cases. See AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989). Justice O'Connor has accused Chief Justice Rehnquist and Justices Scalia and Thomas of attempting to "reform" habeas corpus in a manner rejected by Congress on 13 occasions. See *Wright v. West*, 112 S. Ct. 2482, 2493-98 (1992) (O'Connor, J., concurring in judgment); see also DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 413-14 (1992) (observing that in *McCleskey v. Zant*, Court "reformed" habeas corpus in manner previously rejected by Congress).

124. See *Gomez v. United States Dist. Court*, 112 S. Ct. 1652, 1653 (1992) (per curiam) (The Court reversed the stay of execution of Robert Alton Harris issued to allow the district court to decide the constitutionality of using lethal gas because the "claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process."); see also *Sawyer v. Whitley*, 112 S. Ct. 2514, 2520 (1992) (Rehnquist, C.J.) (affirming denial of habeas corpus and stating that "[i]n the every day context of capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution"); *Coleman v. Thompson*, 112 S. Ct. 1845, 1845 (1992) (per curiam) (denying stay of execution and emphasizing that "[a]s the District Court below observed, this is now the twelfth round of judicial review in a murder case which began eleven years ago" and that "[w]e are hardly well-positioned to second guess the District Court's factual conclusion"); *In re Blodgett*, 112 S. Ct. 674, 676 (1992) (per curiam) (criticizing stay of execution by court of appeals for more than two years while federal habeas appeal pending).

125. 487 U.S. 500 (1988); see also *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2209-15 (1992) (finding a domestic relations exception to diversity of citizenship jurisdiction under 28 U.S.C. § 1332 (1988), and thus narrowing slightly the number of cases that may be filed in federal courts, although the exception was not supported by plain meaning of the statute).

126. See Kevin R. Johnson, *Bridging the Gap: Some Thoughts About Interstitial Lawmak-*

over increasing products liability litigation.<sup>127</sup> By creating a new immunity out of whole cloth, the Court in *Boyle* eliminated an entire class of lawsuits.

In the end, plain meaning statutory interpretation and *Chevron* deference illustrate a common decisionmaking approach of the Rehnquist Court. The Court's decisions and reasoning tend to reduce litigation by creating clear, virtually unimpeachable rules that attempt to minimize the room for dispute about how litigation will be resolved. The focus is not on whether the interpretation of a particular statute makes sense in light of its legislative history, underlying policies, and purposes, or whether the agency acted carefully, impartially, and lawfully. Rather, a general interest in disposing of cases prevails over justice in the individual case. Put differently, the Rehnquist Court perhaps has an unusual conception of justice: a result that reduces litigation in the long run, even if patently unfair in the individual case, is pronounced "just."<sup>128</sup>

The Court might feel that the caseload with more statutes, more agencies, and a relatively static cadre of federal judges necessitates such treatment.<sup>129</sup> Whatever the explanation, recurring themes, and similarly flawed results, resound from the Supreme Court's most recent immigration decisions.

#### V. THE SPECIAL IMPACT OF THE DEFERENCE AND PLAIN MEANING DOCTRINES ON THE ADMINISTRATION OF THE IMMIGRATION LAWS

The Rehnquist Court appears interested in uniform rules rather than carefully crafted ones well-suited to the particular case at hand.

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*ing and the Federal Securities Laws*, 48 WASH. & LEE L. REV. 879, 884-90 (1991) (discussing *Boyle*).

127. See, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 9-10 (1988); REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY *passim* (1986). But see U.S. GEN. ACCOUNTING OFFICE, *PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED* 2 (1988) (excluding cases relating to Dalkon Shield, benedectin, and asbestos, "the growth in products liability filings in federal courts . . . does not appear to have been rapidly accelerating or explosive"); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 20-26 (1986) (noting that the number of tort claims only increased 23.7% during the period 1975 to 1985 when products liability claims are excluded). *Boyle* also is consistent with a crude anti-individual plaintiff, pro-corporate defendant ideology.

128. Cf. *Zatko v. California*, 112 S. Ct. 355, 357 (1991) (per curiam) (stating that Court denied *in forma pauperis* status to petitioner "[t]o discourage abusive tactics that actually hinder us from providing equal access to justice for all").

129. For arguments why an increase in the number of federal judges is not a viable solution to the increase in judicial workload, see REPORT OF THE FED. COURTS STUDY COMM., *supra* note 88, at 6-8; Rehnquist, *A Plea for Help*, *supra* note 87, at 4.

Sound reasons, however, militate against blind application of the deference doctrine to the executive branch's immigration decisions and against use of the plain meaning approach in the interpretation of the immigration laws. Most importantly, the vulnerability of noncitizens in the political process make these default principles problematic when applied to immigration law.

### *A. The Deference Doctrine and Immigration*

Consistent with its general practice, the Court generally avoids wrestling with the specifics of the matter under scrutiny when reviewing agency immigration decisions. Even before *Chevron*, courts historically treated the executive branch's immigration decisions in a highly deferential fashion.<sup>130</sup> The so-called plenary power doctrine precluded judicial review of decisions of Congress and of the executive branch, the branches of government with "political" authority.<sup>131</sup> Although the doctrine is much-criticized,<sup>132</sup> the courts still selectively invoke the doctrine to shield the executive branch's immigration decisions from meaningful judicial review.<sup>133</sup> In recent years, the Supreme Court, with one significant exception, consistently has deferred to the executive branch's judgment in immigration matters.<sup>134</sup> This is consistent with developments in the federal appeals courts, which, since *Chevron*, appear more likely to defer to the INS's judgment than that of many other agencies.<sup>135</sup>

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130. See, e.g., *INS v. Wang*, 450 U.S. 139, 143-46 (1981) (per curiam); see also Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-18 (1984) (discussing judicial deference to executive branch's immigration decisions).

131. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990) (discussing history and impact of plenary power doctrine). The Court first invoked the doctrine in the late 1800s to preclude judicial review of racist immigration laws. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 705-32 (1893); *The Chinese Exclusion Case*, 130 U.S. 581, 609-11 (1889).

132. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 861-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260-78.

133. See, e.g., *INS v. Abudu*, 485 U.S. 94, 110 (1988); *Fiallo*, 430 U.S. at 792; *Mathews*, 426 U.S. at 80.

134. See *infra* note 219 (discussing *Cardoza-Fonseca*); *infra* text accompanying notes 213-449 (discussing recent immigration decisions).

135. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1022 (analyzing data for 1984-85 showing that 83% of INS rulemakings reviewed by courts were affirmed in toto, a rate higher than that for many other agencies); see, e.g., *Furr's/Bishop's Cafeterias, L.P. v. INS*, 1992 U.S. App. LEXIS 25214 (10th Cir. Oct. 9, 1992) (relying heavily upon *Chevron* and deferring to INS's construction of the INA); *El Rescate Legal Servs., Inc. v. Executive Office of Immigra-*



*Chevron* proponents, as well as the Court itself, rationalize deference on the grounds that administrative agencies are politically accountable through election of the President.<sup>136</sup> Assuming the general validity of the theory that administrative agencies are politically accountable,<sup>137</sup> it surely does not apply to the actors entrusted with making immigration decisions. In large part, this is because "aliens" are lawfully excluded from the political process.<sup>138</sup> Even if a majority of the voting public objects to the executive branch's immigration policies and practices, most citizens are not likely to feel their interests being directly affected. Thus, few might be expected to mobilize politically to change how two relatively obscure administrative agencies, the INS and the Executive Office for Immigration Review, treat noncitizens seeking to immigrate to the United States.<sup>139</sup> Instead, the President, and hence the Attorney General, might only be expected to be subject to distinctly anti-immigrant political pressures, expressed by a vocal minority of citizens calling for increased enforcement efforts based on the belief that they are directly affected by immigration. Such pressures are more likely to surface when (as often happens during a recession) noncitizens are blamed for displacing American workers.<sup>140</sup>

This section analyzes some of the other reasons why the executive

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tion Review, 959 F.2d 742, 748 (9th Cir. 1991) (citing *Chevron* and upholding Attorney General's construction of INA). *But cf.* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 212 n.10 (1991) ("Bent upon relieving the harshness of deportation orders, appellate judges have consistently distorted the immigration laws. The Ninth Circuit, for example, has numerous times ruled that deportation orders must be reopened, even though such orders can only be reversed for abuse of discretion. It has also equated sexual abuse by a soldier with political persecution.") (citations omitted); Johnson, *supra* note 6, at 355-59 (discussing court of appeals authority taking "hard look" at BIA asylum decisions). The BIA, nonetheless, has complained of a lack of deference to its decisions. *See In re Cerna*, No. 3161, app. at 11 (BIA Oct. 7, 1991) (interim decision) (stating that "we are not left with the sense in many instances that deference, substantial or otherwise, was accorded our interpretation of the relevant laws and regulation").

136. *See, e.g.*, Scalia, *supra* note 31, at 517-18; Starr, *supra* note 26, at 308, 312; *see also supra* note 23 (quoting *Chevron's* discussion of political accountability of administrative agencies).

137. Many commentators have seriously questioned this theory. *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM 143-45 (1969); PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 4-21 (1981); *see also* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131 (1980) (referring to "'faceless bureaucrats' . . . that . . . are neither elected nor reelected, and are controlled only spasmodically by officials who are"); Merrill, *supra* note 26, at 996 ("[I]t is simply unrealistic, given the vastness of the federal bureaucracy, to expect that the President or his principal lieutenants can effectively monitor the policymaking activities of all federal agencies.") (footnote omitted).

138. *See infra* text accompanying notes 206-12.

139. *See infra* text accompanying notes 206-12.

140. *See infra* text accompanying notes 206-12.

branch's immigration decisions, particularly adjudications in deportation proceedings, may not always be worthy of deference by the judiciary.

### 1. The Status Quo

In evaluating whether the judiciary customarily should defer to the executive branch's action in immigration matters, one must understand the role of the various agencies involved in the administration of the nation's immigration laws.

The Attorney General heads the two primary agencies entrusted with immigration-related matters, the INS and the Executive Office for Immigration Review (EOIR).<sup>141</sup> In public statements about immigration law and policy, the Attorney General, consistent with his role as the nation's chief law enforcement officer, generally emphasizes the need to halt "illegal" immigration.<sup>142</sup> This is understandable in light of the demand by some for increased immigration enforcement.<sup>143</sup>

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141. See INA § 103, 8 U.S.C. § 1103 (1988); 8 C.F.R. § 3.0 (1992).

142. See, e.g., *Administration's Proposals on Immigration and Refugee Policy*, Joint Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary and Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 6 (1981) (testimony of Attorney General William French Smith) ("We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively."); *Barr Vows to Defend Border Integrity*, L.A. TIMES, Feb. 11, 1992, at A24 (reporting that Attorney General Barr told local law enforcement officials that he wants "to get tough on illegal immigrants who are 'crashing in the back door'"); Ronald J. Ostrow, *Action Urged on Stalled Immigration Reform; Meese Links Illegal Aliens, Drug Traffic*, L.A. TIMES, Sept. 18, 1986, at A23 (quoting Attorney General Edwin Meese III as advocating immigration reform because "[i]llegal immigration is contributing to the drug problem"); Ronald J. Ostrow, *Faster Deportation of Criminals Sought*, L.A. TIMES, June 24, 1992, at A3 (reporting that Attorney General William Barr announced various steps to ensure deportation of "criminal aliens"); see also WILLIAM F. SMITH, LAW AND JUSTICE IN THE REAGAN ADMINISTRATION 193-200 (1991) (stating that "immigration problem at bottom requires an end to illegal immigration"). Political pressures apparently explain Attorney General Barr's unsuccessful attempt to withdraw from a settlement agreed to by the INS that would require it to notify noncitizens of their rights and allow them to consult with counsel. See *Judge Approves Rights Settlement, Despite Government's Objections*, 69 INTERPRETER RELEASES 1092, 1092-93 (1992); Susan Freinkel, *How a 'Landmark Collapsed'*, S.F. RECORDER, Aug. 18, 1992, at A1.

143. See, e.g., Major Garrett, *Bush Campaign May Find Free Trade is a Hard Sell*, WASH. TIMES, Aug. 13, 1992, at A11 (reporting that, at behest of Patrick Buchanan, Republican platform seeks provision of "tools, technologies and structures necessary to secure the border"); Ralph Z. Hallow, *Melting Pot Gets Fuller: Immigration Pace Changing A Nation*, WASH. TIMES, June 10, 1992, at A1 (quoting Democratic Presidential candidate Bill Clinton as expressing support for "bill to expand and improve our border patrol to stop the flow of illegal immigration"); JUDY KEEN, *Buchanan Would Fence Out Mexican Illegals*, USA TODAY, Dec. 24, 1991, at A4 (reporting that Republican presidential candidate Patrick Buchanan stated that he would consider building fence at border with Mexico to stop illegal immigration); Henry Muller & John F. Stacks, *There is a Limit to What We Can Absorb*, TIME, Nov. 18, 1991, at 54 (interview with California Governor Pete Wilson in which he states that

The Attorney General delegates much of the authority bestowed upon him by the INA to the INS.<sup>144</sup> Headed by a Commissioner appointed by the President,<sup>145</sup> the INS has district offices throughout the country. Among other duties, these offices adjudicate claims submitted for benefits, such as visa petitions and applications for adjustment of status.<sup>146</sup> INS asylum officers also may decide asylum claims filed with the agency by persons who allegedly fear persecution in their native lands.<sup>147</sup>

Another side of the INS is much more visible to the general public. Immigration inspectors staff ports of entry to examine documents of persons seeking entry into the United States.<sup>148</sup> The Border Patrol, the enforcement arm of the INS, attempts to maintain the integrity of the borders by preventing unauthorized entry into this country.<sup>149</sup> Although the INS has service as well as enforcement functions, the agency fre-

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immigrants are costing state more in welfare payments, health care and public school costs, than they are paying in taxes); D'Jamila Salem, *Where the Candidates Stand On: Immigration*, L.A. TIMES, May 16, 1992, at A20 (reporting that, among other measures, Democratic Presidential nominee Bill Clinton favors strengthening Border Patrol to reduce illegal immigration); Rogers Worthington, *Diverse Group Backs Duke's Narrow Pitch*, CHI. TRIB., Dec. 29, 1991, at 19 (noting that "[o]ne of [David] Duke's issues is immigration and a fear that the U.S. is becoming a Third World nation"); see also EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, 621-43 (1981) (summarizing often blatantly anti-immigrant political party platforms from 1848 to 1964). Two Presidential candidates in the 1992 campaign expressed the view that increased immigration enforcement efforts would be part of their immigration policy, although President Bush focused on enforcement to a greater degree than Bill Clinton. See *Bush, Clinton Differ on Immigration*, 69 INTERPRETER RELEASES 1030, 1030-31 (1992).

144. See INA § 103, 8 U.S.C. § 1103(a) (1988).

145. See INA § 103(b), 8 U.S.C. § 1103(b) (1988).

146. See THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 102-04 (2d ed. 1991).

147. See 8 C.F.R. § 208.1 to .24 (1992). See generally David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1294-1305 (1990) (discussing changes to regulations creating asylum officer position in INS).

148. ALEINIKOFF & MARTIN, *supra* note 146, at 102-03.

149. See IMMIGRATION & NATURALIZATION SERV., ANNUAL REPORT 5 (1986) ("The mission of the Border Patrol as the mobile, uniformed, enforcement arm of the Immigration and Naturalization Service is to ensure that the entry of persons into the United States . . . is controlled . . . by preventing entry without inspection as well as detecting and apprehending illegal aliens within the United States."). The Border Patrol recently has been the subject of shocking claims of abuse. See, e.g., AMERICAS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO 9-43 (1992) (providing comprehensive report of shootings, use of lethal force, physical abuse, and racially discriminatory conduct by Border Patrol); James Bornemeir, *OAS Asked to Condemn U.S. Treatment of Illegal Migrants at Border*, L.A. TIMES, Aug. 13, 1992, at A3 (reporting that human rights group asked Organization of American States to condemn "violent and inhumane" enforcement tactics used by Border Patrol and chronicling incidents); Patrick J. McDonnell, *Border Patrol Agent Charged in Murder is Linked to Drug Theft*, L.A. TIMES, July 24, 1992, at A3 (reporting that Border Patrol agent was charged with first degree murder in connection with shooting of Mexican national); Sebastian Rotella, *Border Officer Pleads Not Guilty in Beating Case*, L.A.

quently has been criticized for overemphasizing enforcement at the expense of immigrants' rights.<sup>150</sup> This criticism has been directed most forcefully at the treatment of persons seeking asylum in the United States.<sup>151</sup>

Another adjudicatory arm of the Attorney General in immigration

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TIMES, July 31, 1992, at A3 (reporting indictment of Border Patrol agent for beating and severely injuring United States resident).

150. See ALEINIKOFF & MARTIN, *supra* note 146, at 102 ("INS was once respected as a relatively well-run and efficient administrative agency, even by those who disagreed with many of the policies carried out. But those days are long in the past."); MILTON D. MORRIS, IMMIGRATION—THE BELEAGUERED BUREAUCRACY 87-88 (1985) ("In recent years, few agencies of the federal government have been as vigorously or persistently criticized as those engaged in enforcing immigration policy. The INS in particular has been a target of widespread criticism, even among public officials."). The United States Commission on Civil Rights stated that "[t]he root of the problems encountered by United States citizens and residents in the service side of INS stem in large part from the conflicting missions of INS—service and enforcement." U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 40 (1980); see also U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION MANAGEMENT: STRONG LEADERSHIP AND MANAGEMENT REFORMS NEEDED TO ADDRESS SERIOUS PROBLEMS 5 (1991) (expressing similar concern); WICKERSHAM COMM'N, REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES 93-94, 178 (1931) (recommending that administration and enforcement of immigration laws be separated to avoid conflicting duties); SUSAN GÓNZALES BAKER, THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT 133-35 (1990) (concluding that competing missions of INS impeded implementation of legalization program under IRCA); HARWOOD, *supra* note 2, at 25 (noting that in fiscal year 1983, 60% of INS budget went to enforcement functions and 9% went to service functions); NORMAN L. ZUCKER & NAOMI F. ZUCKER, THE GUARDED GATE 160-61 (1987) ("[P]ervading the [INS] is the basic law-enforcement mentality found in the Border Patrol, a mentality at odds with the application-of-justice approach that refugee decisions require.").

The Attorney General and the General Accounting Office (GAO) have been vocal at times in criticizing INS operations. See, e.g., U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION MANAGEMENT: STRONG LEADERSHIP AND MANAGEMENT REFORMS NEEDED TO ADDRESS SERIOUS PROBLEMS 3-10 (1991); see also U.S. GEN. ACCOUNTING OFFICE, INFORMATION MANAGEMENT: IMMIGRATION AND NATURALIZATION SERVICE LACKS READY ACCESS TO ESSENTIAL DATA 3-14 (1990); U.S. GEN. ACCOUNTING OFFICE, JUSTICE ISSUES 14-15 (1988) (concluding that INS fails to maintain adequate statistics to determine whether immigration reform under IRCA is working); Jerry Seper, 2 *Senior Posts Added to Aid INS Operation*, L.A. TIMES, March 4, 1991, at A3 (reporting Attorney General Thornburgh's "continued displeasure" with "operation of INS" and GAO report criticizing management of INS). For an interesting bird's-eye critique of the INS bureaucracy, see Weston Kosova, *The INS Mess*, NEW REPUBLIC, Apr. 13, 1992, at 20, 20-25.

151. See, e.g., U.S. GEN. ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 2-4 (1987) [hereinafter GAO, UNIFORM APPLICATION OF STANDARDS UNCERTAIN] (concluding that immigration agencies failed to apply uniform standard in evaluating whether applicant established "well-founded fear of persecution" and that asylum decisions are not always documented); REFUGEE REP., Dec. 30, 1991, at 12 (presenting INS statistics showing approval and denial rates for June 1983 to March 1991 for asylum applications filed with INS district directors which suggest that foreign policy motivates decisionmaking); Johnson, *supra* note 6, at 384-50 (arguing that evidence exists that executive branch is influenced by President's foreign policy in deciding asylum claims); Martin, *supra* note 147, at 1305 (presenting statistics showing that INS

matters, the EOIR exists by virtue of regulation.<sup>152</sup> It houses the immigration court and the administrative appeals tribunal, the Board of Immigration Appeals (BIA). Once part of the INS, the immigration court and BIA were removed from the INS in 1983 and reconstituted as the EOIR.<sup>153</sup> They remain, however, under the authority of the Attorney General.

One of the BIA's functions is to decide appeals of denials by the immigration court of relief from deportation or exclusion, including claims for asylum.<sup>154</sup> The Attorney General appoints the five Board members, who serve without fixed terms.<sup>155</sup> The BIA therefore lacks true independence from the Attorney General. One might suspect the chief law enforcement officer's zeal to some degree influences the BIA.<sup>156</sup> Political pressures emanating from the Attorney General may be reflected in the aggregate pattern of the BIA's asylum decisions, which appear roughly consistent with the President's foreign policy

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district directors' grants and denials of asylum applications suggest disparate treatment based on nationality of applicant).

152. See 8 C.F.R. § 3.0 (1992) (providing that the Attorney General can delegate authority to the EOIR).

153. See 48 Fed. Reg. 8,038 (1983) (amending 8 C.F.R. pts. 1, 3, 100) (final rule). Before the separation, some claimed that immigration judges felt subtle pressures from the INS. See, e.g., *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 259-68 (1981) (statement of Ralph Farb, former BIA member); Maurice A. Roberts, *Proposal: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 7-14 (1980) (former BIA chair); see also William Robie, *A Response to Professor Verkuil*, 39 UCLA L. REV. 1365, 1366 (1992) (observing as Chief Immigration Judge that, before separation in 1983, independence of immigration judge was compromised because court was part of INS, and that separation afforded immigration judges "opportunity . . . to exercise their independence").

154. 8 C.F.R. § 3.1(b) (1992); see also *id.* § 3.1(a)(3) ("Board members shall perform the quasi-judicial function of adjudicating cases coming before the Board.").

155. See 8 C.F.R. § 3.1 (1992); ALEINIKOFF & MARTIN, *supra* note 146, at 111-12 & n.11. The Attorney General also may ultimately review BIA decisions, although he infrequently does so. See 8 C.F.R. § 3.1(h) (1992). But see *infra* text accompanying notes 280-325 (discussing *INS v. Doherty*, 112 S. Ct. 719 (1992), in which Attorney General reversed BIA twice in one matter).

156. Indeed, the BIA currently includes three members formerly employed by the INS (David Milhollan, Mary Maguire Dunne, and Michael J. Heilman), one member who headed the Immigration and Extradition Unit, Criminal Division, Department of Justice (James P. Morris), and one member who formerly served as an attorney for two federal agencies (Fred W. Vacca). The composition suggests that the Board may be sympathetic to the enforcement priorities of the Attorney General, who appointed them, and the INS. See *supra* text accompanying notes 144-53; see also T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 8-10 (1991) (suggesting that in interpreting "persecution on account of . . . political opinion" in "narrow and technical" manner, BIA may be concerned with rising number of asylum applications). I thank George J. Terwilliger, III, Acting Deputy Attorney General, for providing me with biographical sketches of the Board members, which are on file with the *North Carolina Law Review*.

prerogatives.<sup>157</sup>

Finally, the INA and its implementing regulations afford the State Department a role in certain immigration decisions.<sup>158</sup> For example, the Bureau of Human Rights and Humanitarian Affairs of the State Department has the opportunity to submit an opinion on the legal sufficiency of each asylum application.<sup>159</sup> This input has been criticized because, while the State Department generally is concerned with the foreign policy implications of asylum decisions,<sup>160</sup> the Refugee Act bars the consideration of such concerns in the process.<sup>161</sup> Fears of impermissible bias find substantiation in the close correlation between the State Department advisory opinions and the BIA's asylum decisions.<sup>162</sup>

## 2. The Call for Greater Independence in Immigration Adjudication

As mentioned previously, the EOIR adjudicates claims to relief from deportation and exclusion.<sup>163</sup> Within the EOIR, the immigration courts conduct hearings and the BIA decides appeals from immigration court rulings.<sup>164</sup> Deportation orders of the Board may be appealed to the federal courts of appeals.<sup>165</sup> Under certain circumstances, judicial defer-

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157. See Johnson, *supra* note 6, at 336; see also ALEINIKOFF & MARTIN, *supra* note 146, at 739 n.26 (noting lack of certainty in available data, but acknowledging that "there is certainly room for substantial concern" about bias in asylum decisions). The INS, EOIR, and the Department of State recently settled a class action alleging that those agencies discriminated against asylum seekers from El Salvador and Guatemala. See *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991); see also Carolyn P. Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT'L J. REFUGEE L. 347, 355 (1991) (discussing terms of the settlement and its implications).

158. See ALEINIKOFF & MARTIN, *supra* note 146, at 115-17.

159. See 8 C.F.R. § 208.11(a) (1992); see also Martin, *supra* note 147, at 1311-13 (describing Department of State's changing policies in providing advisory opinion on asylum applications).

160. See, e.g., Martin, *supra* note 147, at 1331-34 (noting charges of political bias in asylum adjudication due to reliance upon advisory opinions and recommending that State Department be removed from process). In addition, the State Department recently expressed concern with the number of Haitians granted asylum by the INS. See, e.g., Susan Beck, *Cast Away*, AM. LAW., Oct. 1992, at 51; Howard W. French, *Flight of Haitians Suddenly Resumes*, N.Y. TIMES, May 16, 1992, at A1.

161. See *infra* text accompanying notes 199-201.

162. See GAO, UNIFORM APPLICATION OF STANDARDS UNCERTAIN, *supra* note 151, at 22-23 (showing that during one year, final agency adjudications of asylum claims agreed with Department of State's opinion 96% of time).

163. In addition, the INS has an Administrative Appeals Unit (AAU) that decides appeals of certain INS decisions. See ALEINIKOFF & MARTIN, *supra* note 146, at 113-14 (discussing difficulty in determining which orders should be appealed to BIA or AAU).

164. See 8 C.F.R. §§ 3.1(b), 242.21 (1991); see also ALEINIKOFF & MARTIN, *supra* note 146, at 107-14.

165. INA § 106(a), 8 U.S.C. § 1105a(a) (1988). Judicial review of exclusion decisions (that

ence to BIA decisions might be warranted. Under the present administrative framework, however, it often is not.

Commentators long have noted that the BIA is in need of greater independence from the Attorney General. Evidence suggests that such independence is particularly lacking in asylum adjudications.<sup>166</sup> A number of proposals have been made to ensure that immigration adjudication is performed independently of the Attorney General's influence.<sup>167</sup>

The evolution of the views of Maurice Roberts, retired Chair of the BIA,<sup>168</sup> on the need for reform of the administrative structure is telling.<sup>169</sup> In 1977, Roberts called upon Congress to enact a statute expressly creating the Board, rather than allowing its existence to rest on a regulation in place at the discretion of the Attorney General.<sup>170</sup> He concluded that "the Board's relationship to the Department [of Justice is] that of an acknowledged bastard, whose presence cannot be realistically denied *but whose legitimacy is rendered questionable by its lack of any statutory recognition.*"<sup>171</sup> He further suggested that Board members be appointed by the President and confirmed with the advice and consent of

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is, decisions to exclude persons from entering the country) may be obtained through habeas corpus proceedings in federal district court. See *id.* § 106(b), 8 U.S.C. § 1105a(b) (1988).

166. See Deborah Anker, *Determining Asylum Claims in the United States: An Empirical Case Study*, 19 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 1992) (empirical study of one immigration court concluding: (1) that ad hoc rules and standards, ideological preferences, and impermissible political judgments influenced asylum decisions; (2) that there is appearance of partiality by judges who often question applicant in manner similar to government attorney; (3) that serious problems exist concerning interpretation of foreign languages; (4) that immigration judges refuse to consider objective evidence of persecution but instead rely on personal political judgments; and (5) that immigration courts suffer from bureaucratic delays and inefficiencies); see also Carolyn P. Blum, *License to Kill: The Principle of Legitimate Governmental Authority to "Investigate Its Enemies"*, 28 WILLAMETTE L. REV. 719 (1992) (showing apparent inconsistency in BIA rulings on issue whether governmental actions amount to persecution); Johnson, *supra* note 6, at 343-48 (presenting statistical and other evidence of foreign policy bias in EOIR rulings); Derek Smith, Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Action in Asylum Cases*, 75 VA. L. REV. 681 (1989) (reviewing BIA rulings and reaching similar conclusion); cf. Paul R. Verkuil, *Reflections on the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1345-47 (1992) (noting that Administrative Law Judges under Administrative Procedure Act possess greater "decisional independence" than "administrative judges" in EOIR).

167. The most far-reaching proposal was a call for consolidation of all immigration responsibilities into a new Agency for Migration Affairs. See COMMISSION FOR THE STUDY OF INT'L MIGRATION AND COOP. ECONOMIC DEV., UNAUTHORIZED MIGRATION: AN ECONOMIC DEVELOPMENT RESPONSE 27-30 (1990).

168. Roberts was recently honored for his years of immigration service in *Festschrift: In Celebration of the Work of Maurice Roberts*, 5 GEO. IMMIGR. L.J. 199 (1991).

169. It should be noted that Roberts expressed these views before formation of the EOIR in 1983. See *supra* text accompanying notes 152-53 (describing reorganization).

170. See Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 43-44 (1977).

171. *Id.* at 30 (emphasis added).

the Senate.<sup>172</sup> Because "personal attitudes may have a crucial effect in the decision-making process," Roberts advocated the careful selection of Board members.<sup>173</sup>

Three years later, Roberts endorsed a more far-reaching proposal calling for the creation of an Article I immigration court.<sup>174</sup> The reason for his change of heart was that "[i]t is becoming increasingly apparent that the present system of decision-making under the immigration and nationality laws simply isn't working."<sup>175</sup> The nub of the problem is that the Department of Justice, including the Attorney General, tends to focus on enforcement issues.<sup>176</sup> Truly independent decisionmakers are lacking. Roberts's cure was that "adjudicators must be completely separated organizationally from enforcement officials, so that their independence from prosecutorial influence, direct or indirect, is not only actual but perceived to be so."<sup>177</sup>

Despite such trenchant criticisms, significant changes have been slow in coming. Though separate from the INS, the EOIR continues to operate under the direction of the Attorney General. The lack of independence under the current regime raises serious questions about the EOIR's impartiality.<sup>178</sup>

### 3. The "Independent" Agency Example

Besides the Article I court advocated by some, the present-day federal bureaucracy provides many different examples of administrative structures far more independent than the INS and EOIR. The so-called "independent" agencies vary in nature, but they share the characteristic that their members may not be removed by the President.<sup>179</sup> Decisions

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172. *Id.* at 44.

173. *Id.* at 31.

174. See Roberts, *supra* note 153, 18-20; see also U.S. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT 248-49 (1981) (making similar recommendation); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 651-54 (1981) (same).

175. Roberts, *supra* note 153, at 2.

176. See *id.* at 3-6; see also *supra* text accompanying notes 141-51 (discussing similar concerns).

177. Roberts, *supra* note 153, at 16 (footnote omitted).

178. For a review and analysis of immigration adjudication concluding that the BIA probably should remain under the supervision of the Attorney General but with increased safeguards ensuring greater independence, see Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1398-99 (1986); see also Martin, *supra* note 147, at 1344-46 & n.265 (reaching similar conclusions with respect to asylum adjudication).

179. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259-63 [hereinafter Verkuil, *Purposes & Limits*]; see also LANDIS, *supra* note 98, at



generated by such agencies are more worthy of deference than are those of the INS and the EOIR.<sup>180</sup>

Adjudication is a well-accepted function of independent agencies, such as the Interstate Commerce Commission and the Federal Trade Commission.<sup>181</sup> Indeed, Professor Verkuil proposed "that independent agencies are best designed to adjudicate."<sup>182</sup> To ensure impartial decisionmaking, administrative adjudication generally is independent of the policy-making authority.<sup>183</sup> For example, the Occupational Safety and Health Administration sets and enforces health and safety standards, while an independent agency, the Occupational Safety and Health Review Commission, adjudicates challenges to the standards.<sup>184</sup> Mine Safety and Health Administration standards are reviewed by the independent Federal Mine Safety and Health Review Commission.<sup>185</sup>

Even though debate continues about whether independent agencies are truly insulated from political pressures,<sup>186</sup> the independent agency model offers significantly more assurance of impartiality than the present immigration system, which vests ultimate decisionmaking authority in

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111 (describing purpose of creating independent agencies). *But see* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 81-82 (outlining reasons why independent agencies cannot be rationalized by their alleged insulation from political pressure).

180. *But cf.* Verkuil, *Immigration Procedures*, *supra* note 43, at 1196-97 (suggesting that legislative proposal calling for creation of independent agency for immigration adjudication is misplaced).

181. *See* Verkuil, *Purposes & Limits*, *supra* note 179, at 263-64.

182. *Id.* at 278.

183. *See* Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 966-97 (1991).

184. *See* 29 U.S.C. §§ 651-78 (1988).

185. *See* 30 U.S.C. § 823 (1988).

186. *See* Miller, *supra* note 179, at 82-83; *see also* WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 4 (1967) (former Securities and Exchange Commission chairman stating that "[g]overnment regulatory commissions are often referred to as 'independent' agencies, but this cannot be taken at face value by anyone who has ever had any experience in Washington"); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 443-44 & n.4 (1987) (discussing President Reagan's increased centralization of control over independent agencies); Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 156-72 (1991) (discussing Presidential oversight over Environmental Protection Agency).

Some also have claimed that independent agencies violate the separation of powers. *See* Miller, *supra* note 179, at 41. *But see* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-80 (1984). In light of recent decisions, it seems unlikely that the Court would invalidate a traditional independent agency on separation of powers grounds. *See generally* Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 710-61 (1990) (analyzing the Court's recent separation of powers decisions).

the Attorney General.<sup>187</sup> Particularly because of the persistent concern with the conflicting functions of the INS, as well as continuing doubts about the independence of the BIA,<sup>188</sup> complete separation of policy making and adjudication is particularly well-suited for the administration of the immigration laws. In any event, immigration adjudications are not made by anything resembling an independent agency. Only Congress can change that fact.

#### 4. Conclusion

Some commentators, in reaction to *Chevron* and perceiving a need to police political partisanship, have called for the reversal of the *Chevron* presumption and for rigorous judicial review of agency decisions.<sup>189</sup> The Supreme Court, however, has opted for deferential review. Alternatives to the two extremes exist. Courts should not review agency action in a vacuum. Nor should they disregard the structure of the particular administrative system that produced the decision. In its four most recent immigration decisions, however, the Court seemed more concerned with establishing rules that would decrease litigation and appeals than about whether those decisions were the accurate result of impartial decisionmaking.<sup>190</sup>

When reviewing the executive branch's immigration decisions, the Court should consider that, unlike some agencies, the INS consistently has been criticized for abuse, ineptitude, and overemphasis on enforcement with a concomitant lack of sensitivity to the delicate life and liberty interests at stake, particularly in deportation proceedings. For many reasons, including language and cultural barriers exacerbated by the sheer complexity of the immigration laws and administrative procedures, immigrants are particularly vulnerable to the strong-arm tactics of the INS. Trends in BIA decisions, as well as the administrative structure, suggest

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187. This is not to suggest that deference should *only* be afforded those decisions made by an independent agency. The Court, perhaps correctly in some instances, has applied the deference principle to the review of actions of agencies of all types. See *supra* text accompanying notes 23-44. The Court, however, should be much more careful in its deference analysis in order to ensure that there is at least a modicum of impartiality—sufficient to afford adequate assurance of compliance with the statute at issue—in an adjudication before deferring to an administrative ruling.

188. See *supra* text accompanying notes 152-78.

189. See, e.g., CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 144-47 (1990); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 465-69 (1987). For arguments that *Chevron* should not mean automatic deference by the courts, see Johnson, *supra* note 6, and Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLIMETTE L. REV. 773 (1992).

190. See *infra* text accompanying notes 213-449.

that careful judicial review is needed to ensure compliance with the law and to ferret out impermissible bias from the process.

### B. *The Plain Meaning Doctrine and Immigration*

Against a backdrop of divergent approaches to statutory interpretation,<sup>191</sup> the Court addressed a series of immigration cases last term dealing with the Immigration and Nationality Act of 1952 (INA), the comprehensive statute regulating immigration.<sup>192</sup> The Act has been amended almost annually, with three important recent revisions being the Refugee Act of 1980,<sup>193</sup> the Immigration Reform and Control Act of 1986 (IRCA),<sup>194</sup> and the Immigration Act of 1990.<sup>195</sup> The voluminous legislative history of the INA and its many amendments make it clear that Congress passed each of these laws for distinctly different and often conflicting reasons, in response to demands from many different constituencies, and to remedy very different problems. For example, the IRCA, among other things, created amnesty and agricultural worker programs;<sup>196</sup> the Refugee Act primarily dealt with the admission of refugees;<sup>197</sup> the Immigration Act of 1990 made it easier to deport and exclude immigrants convicted of certain crimes and created a brand new "temporary protected status" in this country for certain persons who flee civil strife.<sup>198</sup> In short, although all were amendments to the same statute, each amendment had very different purposes.

As one might expect, the legislative history to some amendments suggests that Congress acted with a specific purpose. For example, Congress designed the Refugee Act to overhaul the asylum provisions of the INA and to conform United States law to international law.<sup>199</sup> Although the "plain meaning" of the text does not expressly state, there is little

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191. See *supra* text accompanying notes 45-78.

192. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). For a description of developments and proposals culminating in the INA, see HUTCHINSON, *supra* note 143, at 251-313.

193. Pub. L. No. 96-212, 94 Stat. 102 (1980).

194. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

195. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

196. See IRCA §§ 201, 301-305, 100 Stat. 3359, 3394-3404, 3411-3434 (1986) (codified as amended in part at 8 U.S.C.A. § 1160-1161, 1188, 1255a (West 1970 & Supp. 1992)).

197. See generally Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (discussing legislative history of Refugee Act in detail).

198. See Immigration Act of 1990, Pub. L. No. 101-649, §§ 302, 303, 505-515, 104 Stat. 4978, 5030-5038, 5048-5053.

199. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-41 (1987) (discussing Refugee Act's attempt to conform domestic law to the United Nations Protocol Relating to the Status of Refugees, opened for accession Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267); *INS v. Stevic*,

doubt that both a desire to ensure adherence to international law and the past treatment of refugees in a manner inconsistent with that law fueled passage of the Act.<sup>200</sup> Similarly, although not spelled out in the statutory text, there can be little doubt from the legislative history that, as mandated by international law, Congress designed the Act to remove the President's foreign policy concerns from individual asylum decisions.<sup>201</sup>

### 1. Discretion and the INA

One substantive theme to the INA is particularly relevant to the special impact on immigrants resulting from plain meaning interpretation. The law is well-known for the considerable discretion delegated to the Attorney General over many immigration decisions, discretion that is equalled in few administrative schemes.<sup>202</sup> Although the plain meaning of the statute seems to afford unlimited discretion, until recent years, the pertinent agencies have tended to impose common-sense limits on that discretion.<sup>203</sup> Before the ascendancy of the plain meaning doctrine, the courts generally refused to read the plain meaning of "discretion" in the

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467 U.S. 407, 421 (1984) (same); *see also* *INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring in judgment in part, dissenting in part) (same).

200. For an exhaustive analysis of the legislative history of the Refugee Act on this point, *see* Anker & Posner, *supra* note 197, at 43-64.

201. *See, e.g.*, S. REP. NO. 590, 96th Cong., 2d Sess. 20 (1980) (directing the Attorney General to establish a new uniform asylum procedure); H.R. REP. NO. 608, 96th Cong., 1st Sess. 9 (1979) (stating that definition of refugee "eliminates the geographical and ideological restrictions now applicable" to refugee admissions); *see* Johnson, *supra* note 5, at 289-94, 326-35.

202. *See* *Amanullah v. Nelson*, 811 F.2d 1, 4 (1st Cir. 1987) ("By statutory enactment, Congress has delegated its unusually broad dominion in the immigration field to the Attorney General."); *Jean v. Nelson*, 727 F.2d 957, 965-67 (11th Cir. 1984) (en banc) (referring to the INA's "sweeping delegations of congressional authority" to the Attorney General), *aff'd*, 472 U.S. 846 (1985); *see, e.g.*, INA § 244(a) (codified as amended at 8 U.S.C. § 1254(a) (1988)) (affording Attorney General discretion to grant relief of suspension of deportation); *id.* § 245(a) (codified as amended at 8 U.S.C. § 1255(a) (1988)) (affording Attorney General discretion to grant relief of adjustment of status).

203. *See, e.g.*, *In re Edwards*, No. 3134, slip op. at 6-11 (BIA May 2, 1990) (interim decision) (extensively reviewing facts and circumstances in exercise of discretion on claim for suspension of deportation); *In re Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987) (ruling that favorable exercise of discretion in grant of asylum to "refugee" is warranted absent "most egregious of adverse factors"); *In re Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978) (listing factors to be considered in exercise of discretion on suspension claim). *See generally* HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 5-6, 13-26 (1962) (advocating articulation of standards by agencies to afford predictability and intelligibility to agency decisions). *But cf.* *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985) (Easterbrook, J.) (The court reviewed the exercise of discretion and emphasized that the "power to reopen a case and grant an adjustment of status is a power to dispense mercy. No one is entitled to mercy, and there are no standards by which judges may patrol its exercise."). Presumably in response to the Court's plain meaning methodology, however, the BIA recently has tended to interpret the INA in plain meaning fashion. *See* *Matter*

INA as unlimited when to do so would be inconsistent with the statute as a whole, or might raise grave constitutional concerns.<sup>204</sup> Plain meaning interpretation threatens such sensible results.

A plain meaning tack would limit judicial policing of agency action unnecessarily. "Discretion" in the plain meaning world need not be limited by Congressional purpose or any other non-textual constraints. Even if not spelled out in the text of the INA, Congress obviously passed the law's amendments with specific purposes in mind. Its many provisions should be read as a whole to impose reasonable limits on the delegations of facially-unlimited discretion to the executive branch. Plain meaning interpretation, by eliminating relevant gloss on the statutory language, distorts the language in the immigration laws, leaving us with sterile words divorced from meaning. For that reason alone, immigration law, similar to other areas of substantive law,<sup>205</sup> is not a good candidate for plain meaning interpretation.

## 2. Overriding Judicial Interpretations of the INA

To further complicate matters, the evils of plain meaning interpretation of the immigration laws cannot be cured as easily as the weaknesses in the judicial construction of ordinary statutes directly impacting the public at large. Change in the immigration laws is constrained by the simple fact that the Constitution has been interpreted to allow "aliens" to be barred from voting.<sup>206</sup> Consequently, one cannot expect Congress to

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of A- A-, No. 3176, 1992 BIA LEXIS 14 (BIA May 15, 1992) (interim decision); Matter of K-, No. 3163, slip op. at 8-10 (BIA Nov. 5, 1991) (interim decision).

204. See, e.g., *Jean v. Nelson*, 472 U.S. 846, 857 (1985) (limiting "discretion" in parole provision of INA to bar discrimination on basis of race or national origin); *United States v. Witkovich*, 353 U.S. 194, 199-202 (1957) (limiting Attorney General's "discretion" in requiring information from deportable "alien" under INA to avert serious constitutional questions); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 519 (9th Cir. 1985) (holding that BIA may rely only upon "legitimate" concerns in exercising discretion to deny asylum); *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.) (when exercising discretion with respect to suspension of deportation, INS may not weigh "'considerations that Congress could not have intended to make relevant'") (quoting *United States ex rel. Kaloudis v. Shaughnessey*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, C.J.)).

205. See, e.g., Aleinikoff & Shaw, *supra* note 76, at 698-706 (criticizing plain meaning interpretation of Civil Rights Attorney's Fees Awards Act of 1976); Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for the Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 864-68 (1992) (criticizing plain meaning interpretation of Federal Rules of Evidence).

206. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (noting in conclusory fashion that "aliens" cannot vote); *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973) ("This Court has never held that aliens have a constitutional right to vote . . . Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting" right to vote.); Gerald L. Neuman, *"We Are the People": Alien Suffrage in*

feel the political heat to cure the shortcomings of the Supreme Court's plain meaning interpretations of the INA, as defined by the Supreme Court.<sup>207</sup> Because voters may not feel personally affected by plain meaning interpretation of the INA, they lack the concrete incentive to mobilize as a political constituency on such issues. This is true even if a majority of the voters support the immigrants' position.

Only when some citizens believe that immigration has some concrete impact on their lives are they likely to mobilize politically to change the immigration laws. One therefore would more likely expect Congress to be pressed to crack down on "illegal" immigration during times of relatively high unemployment, when a portion of the public may feel directly affected by the presence of noncitizens in this country.<sup>208</sup> Particularly in difficult economic times, some citizens historically have been susceptible to nativist cries that immigrants threaten "American jobs."<sup>209</sup> Special-interest groups, such as organized labor, may play on such fears

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*German and American Perspective*, 13 MICH. J. INT'L L. 259, 291-310 (1992) (outlining history of denial of suffrage to "aliens" in United States and observing that although United States Constitution is "oblique" on the question of "alien" suffrage, including Article I's language that members of House of Representatives shall be "chosen . . . by the People of the several States," U.S. CONST. art. I, § 2, cl. 1, "it appears to be settled doctrine that [under the federal Constitution], alien suffrage is entirely discretionary"). For the classic treatment of the arguments in favor of suffrage in the face of denial of the right by every state, see Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1115-36 (1977). Because "aliens" are disenfranchised, the Court has treated them as a discrete and insular minority for equal protection purposes, thus subjecting to strict scrutiny any law employing an "alienage" classification. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 20-23 (1982) (Blackmun, J., concurring); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); see also ELY, *supra* note 137, at 148-49, 151, 161-62 (advocating strict scrutiny of "alienage" classifications).

207. See *supra* text accompanying notes 141-51 (discussing political pressures on Attorney General to limit "illegal immigration").

208. See, e.g., Tracy Wilkinson, *Candidates Tough on Immigration*, Cot. 19, 1992, at A3 (noting that Democratic and Republican candidates for Senate in California advocated increased border enforcement); James Bornemeier, *Poll Says Majority Favors U.S. Immigration Freeze*, L.A. TIMES (Southland ed.), May 20, 1992, at A16 (reporting poll showing sentiment to limit "illegal" immigration); see also Martin, *supra* note 147, at 1269 (noting that "as a matter of practical politics" public probably favors "control over the entry of aliens" over "the promise of refuge to the persecuted"); Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIGR. L.J. 1, 21-25 (1991) (arguing that one component of "emerging political consensus on immigration law" is "enhanced enforcement"); *supra* text accompanying notes 141-51 (discussing INS emphasis on immigration enforcement).

Although the Refugee Act of 1980 demonstrates that not all immigration legislation is pro-enforcement, much immigration legislation in the 1980s focused at least in part on efforts to reduce "illegal" immigration. See, e.g., Immigration Act of 1990, Pub. L. No. 101-649, § 503, 104 Stat. 4978 (amending INA § 287(a), 8 U.S.C. § 1357(a)) (enhancing INS enforcement authority); *id.* § 541 (increasing size of Border Patrol); Immigration Marriage Fraud Amendments, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

209. See generally HIGHAM, *supra* note 2, at 68-77 (noting the connection between economic downturns and increases in sentiment against immigrants).

in the political process.<sup>210</sup>

This is not to suggest that noncitizens should be afforded the right to vote or that Congress cannot restrict immigration if a majority of the voters so desire. The point instead is that similar to laws affecting children, criminal defendants, and other disenfranchised groups, immigrants are especially vulnerable in the political process. In light of the political realities, Congress cannot be expected to overrule the courts' plain meaning interpretations of the INA, *even if a majority of the public thinks the interpretation unreasonable, unwise, and unfair*.<sup>211</sup> The limited political

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210. See generally GWENDOLYN MINK, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT: UNION, PARTY, AND STATE, 1875-1920* (1986) (discussing history of organized labor's positions on immigration).

211. See Eskridge, *Overriding Supreme Court Decisions*, *supra* note 22, at 358-59 ("Congress will generally not override Supreme Court statutory decisions unless a politically salient group presses for an override and unless other relevant groups, especially government officials and political party leaders, acquiesce in the override.") (footnote omitted). Indeed, Professor Eskridge partly attributed the overriding of *Boutilier v. INS*, 387 U.S. 118 (1967), which interpreted the "psychopathic personality" basis for exclusion under the INA to include homosexuality, to the increased political strength of the organized gay and lesbian community, not the influence of immigrants. See Eskridge, *Overriding Supreme Court Decisions*, *supra* note 22, at 357-59, 411-12.

Of course, this does not mean to suggest that immigrants and refugee rights groups lack any political power. Indeed, at various times such groups have played a prominent role in molding and enacting legislation—the Refugee Act of 1980 being a particularly striking example. Some also have argued that political pressures mounted by such groups hinder INS enforcement efforts. See HARWOOD, *supra* note 2, at 168-69. Nonetheless, although immigrant groups have some sway in the political process, that input is limited by the fact that their constituents lack direct access to the ballot box. For the argument that the relatively small group of putative "refugees" enjoys far less political support than immigrants and potential immigrants as a whole (who often have the support of business interests desirous of cheap migrant labor), see John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 846 (1982). Scanlan also argues that the concern with the numbers of immigrants coming to the United States may adversely affect the treatment of refugees. *Id.*

It is true that Congress has overridden a few Supreme Court immigration decisions to the benefit of immigrants. See, e.g., Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3439-3440 (1986) (overruling *INS v. Phinpathya*, 464 U.S. 1843 (1984)); Eskridge, *Overriding Supreme Court Decisions*, *supra* note 22, at 344 tbl. 4 (noting that 3% of Congressional overrides of Supreme Court decisions from 1967-90 were immigration cases, which placed immigration in a tie for 11th out of 22 subject matter categories of Supreme Court decisions overridden by Congress). Professor Eskridge's empirical study shows that "noncitizens" gained from such action in two percent (two cases) of the total number of cases that were overridden within 10 years of the Court's decision. *Id.* at 348 tbl. 7. The study further shows that, from 1978 to 1984, 80% of the Supreme Court decisions (four out of five cases) in which noncitizens lost were *not* overridden by Congress. *Id.* at 351 tbl. 9. Given the limited number of Congressional overrides of Supreme Court immigration decisions, Professor Eskridge was unable to formulate any generalized conclusions. See *id.* at 376.

Even assuming that "aliens" have enjoyed some success in overriding Supreme Court decisions, most immigration matters are finally decided in the lower courts, and Congress generally is unaware of lower court interpretations of the laws. See *id.* at 415-16. Thus, immigrants evidently will be subject to the plain meaning interpretations of those courts. Moreover,

clout of immigrants and the general dearth of interest in immigration matters because of the lack of direct personal stake in such issues, militate against Congressional action. This suggests that plain meaning interpretation places a burden on immigrants not imposed on other interest groups. Courts should properly consider this fact when interpreting the immigration laws.<sup>212</sup>

### C. Conclusion

Unlike other bodies of law administered by different agencies, the deference and plain meaning doctrines are not well-suited to reviewing the executive branch's immigration decisions or interpreting the INA. Even though the voting public may disagree with the INS or BIA's treatment of noncitizens or with judicial interpretation of the INA, such events do not directly and palpably affect the polity in a way that might be expected to spark political action. It therefore seems unlikely that voters will mobilize around such issues. Under the Rehnquist Court's regime, even if contrary to public sentiment, the INS and BIA's actions and the courts' plain meaning interpretations of the INA are likely to go unchecked.

## VI. IMMIGRANTS IN THE OCTOBER 1991 TERM

Usually, the Supreme Court tackles the esoteric immigration laws in at most one case each year. In the October 1991 term, however, the Court decided four immigration cases within a two-month period.<sup>213</sup>

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the default principles endorsed by the Supreme Court are designed to reduce further appellate review. *See supra* text accompanying notes 79-129. In light of these facts, the ability to override few Supreme Court decisions sheds little light on the political power of immigrants to change the immigration laws.

212. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

213. In addition, in *United States Dep't of State v. Ray*, 112 S. Ct. 541, 548-50 (1991), the Court, in an opinion by Justice Stevens, held that an exemption to the Freedom of Information Act (FOIA) shielded from disclosure the identities of persons returned to Haiti who were interviewed by the State Department. *See supra* note 7 (discussing executive branch's treatment of persons fleeing Haiti). The State Department claimed that the interviews demonstrated that the Haitian government had not persecuted citizens returned there. *See Ray*, 112 S. Ct. at 544. To test the accuracy of that assertion, a lawyer and three Haitian asylum-seekers requested the identities of persons interviewed and planned to contact them. *Id.* at 544. Based on a FOIA provision that allowed withholding of materials if disclosure "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (1988), the State Department refused to identify the individuals. *See Ray*, 112 S. Ct. at 544-45. The Court of Appeals for the Eleventh Circuit found that the public interest in determining the truthfulness of the assertions of the State Department outweighed the privacy interests. *Ray v. United*



This extraordinary occurrence produced results generally in keeping with broader developments in the Rehnquist Court's approaches to deference to administrative agencies and plain meaning statutory interpretation. In each case, the Court effectively deferred to the INS or BIA. With one notable exception, the Court viewed statutes and regulations through a plain meaning lens. In the exceptional case, the Court abandoned plain meaning methodology in order to defer to INS's judgment.

### A. *Asylum and Withholding of Deportation*

As amended by the Refugee Act of 1980, the INA defines a "refugee" eligible for asylum as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>214</sup> The Attorney General or, more accurately, his delegatee, has the discretion to grant asylum to a "refugee."<sup>215</sup> To be entitled to a related form of relief known as withholding of deportation,<sup>216</sup> the applicant must establish a clear probability of persecution, a standard more exacting than the well-founded fear standard applicable to asylum.<sup>217</sup> Unlike asylum cases, the Attorney General lacks discretion to deport persons who have established the necessary persecution,<sup>218</sup> making withholding of deportation a mandatory remedy when the applicant satisfies the requisite burden.

The Court's two most recent asylum-related decisions reflect the rise to dominance of the deference and plain meaning doctrines.<sup>219</sup> In evalu-

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States Dep't of Justice, 908 F.2d 1549, 1556 (11th Cir. 1990). The Supreme Court reversed. *Ray*, 112 S. Ct. at 547-50. In weighing the privacy and public interests, the Court emphasized, in deferential tones, that there was no evidence "that tends to impugn the integrity of the [State Department] reports. We generally accord government records and official conduct a presumption of legitimacy." *Id.* at 550. In deferring to the State Department's judgment, the Court failed to acknowledge its potential conflict of interest in asylum matters. See *supra* text accompanying notes 158-62.

214. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988) (emphasis added); see *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

215. See INA § 208(a), 8 U.S.C. § 1158(a) (1988); see, e.g., *In re Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); see also Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1, 49-65 (1987) (discussing limits on discretion).

216. See INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988).

217. See *Cardoza-Fonseca*, 480 U.S. at 431; *INS v. Stevic*, 467 U.S. 407, 413-30 (1984).

218. See *Cardoza-Fonseca*, 480 U.S. at 429-30 n.9, 440-41, 444; *Stevic*, 467 U.S. at 426 & n.20. This is true so long as the applicant does not fall within one of the exceptions enumerated in the statute. See INA § 243(h)(2), 8 U.S.C. § 1253(h)(2) (1988).

219. As in the four immigration decisions last term, the deference and plain meaning doctrines intersected in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The Court's resolution of

ating the decisions, it is noteworthy that, according to INS statistics, asylum applications increased dramatically in recent years.<sup>220</sup> That, in turn, increased the number of appeals of BIA asylum and withholding of deportation decisions in the federal courts.

### 1. *INS v. Elias-Zacarias*

Two masked guerrillas armed with machine guns came to the home

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the issues in *Cardoza-Fonseca*, however, was directly contrary to the Court's recent methodology. In rejecting the BIA's conclusion that the well-founded fear of persecution standard applicable to asylum was identical to the clear probability standard for withholding of deportation, *see supra* text accompanying notes 214-18, the Court, in an opinion by Justice Stevens, reviewed the Refugee Act's legislative history, the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, and a handbook interpreting the Protocol, the UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979). *See Cardoza-Fonseca*, 480 U.S. at 427-43. The Court further recognized, but found it unnecessary to apply, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," and stressed the all-important life and liberty interests at stake. *Id.* at 449-50 (citations omitted). The Court found that *Chevron* did not require deference to the BIA's interpretation because "[t]he question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical." *Id.* at 446 (footnote omitted); *see also supra* text accompanying notes 30, 51, 75-77 (discussing Justice Stevens' approach to *Chevron* deference and statutory interpretation).

Arguing that the plain meaning of the statute clearly answered the interpretive question, Justice Scalia objected to the majority's reliance upon extraneous materials and emphasized that "[j]udges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *Cardoza-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring in judgment); *see also* Eskridge, *New Textualism*, *supra* note 22, at 650-56 (discussing Justice Scalia's opinion in *Cardoza-Fonseca*). In Justice Scalia's view, because the INS interpretation was contrary to the statute's plain meaning, *Chevron* was inapplicable. *See Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring); *supra* text accompanying notes 31, 54-59 (discussing Justice Scalia's views about *Chevron* deference and statutory interpretation).

As suggested by the four immigration decisions last term, Justice Scalia appears to have convinced the Court of the validity of his views expressed in *Cardoza-Fonseca*. *See also* National R.R. Passenger Corp. v. Boston & Me. Corp., 112 S. Ct. 1394, 1401-02 (1992) (Kennedy, J.) (holding that because "agency interpretation [was] not in conflict with the plain language of the statute, deference [was] due"); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988) (Kennedy, J.) (stating that deference should be given to agency regulations that do not conflict with plain meaning of statute).

220. *See* IMMIGRATION AND NATURALIZATION SERV., 1989 STATISTICAL YEARBOOK xxx-xxxi (1990); *see also* JOHN H. FRYE, III, SURVEY OF NON-ALJ HEARING PROGRAMS IN THE FEDERAL GOVERNMENT 4 (1991) (finding that EOIR processes largest volume of administrative adjudications by non-administrative law judges, amounting to about 152,000 annually or 44% of total). INS officials, however, recently stated that fewer asylum applications than expected have been filed with the INS. *See INS, Advocates Dispute Asylum Statistics*, 69 INTERPRETER RELEASES 1065, 1065-66 (1992).

of eighteen-year old Jairo Jonathan Elias-Zacarias in Guatemala.<sup>221</sup> Because Elias-Zacarias refused to join their forces, the guerrillas promised to return.<sup>222</sup> Fearing that the guerrillas would kill him, he fled the country.<sup>223</sup> The explanation offered by Elias-Zacarias for his actions was straight-forward: "[I]f you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family."<sup>224</sup>

Finding that testimony insufficient, the immigration court and BIA denied Elias-Zacarias' claims for asylum and withholding of deportation.<sup>225</sup> Though affirming denial of withholding of deportation, the Court of Appeals for the Ninth Circuit reversed on the asylum claim.<sup>226</sup> The court reasoned that the guerrillas' threat constituted "persecution . . . 'on account of political opinion' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutors and because the persecutors' motive . . . is political."<sup>227</sup>

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221. See *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990), *rev'd*, 112 S. Ct. 812 (1992). Some of the thoughts about *Elias-Zacarias* are borrowed from Deborah E. Anker et al., *The Supreme Court's Decision in INS v. Elias-Zacarias: Is There Any "There" There?*, 69 INTERPRETER RELEASES 285 (1992), which I co-authored.

222. *Zacarias*, 921 F.2d at 847.

223. *Id.*

224. *INS v. Elias-Zacarias*, 112 S. Ct. 812, 819 n.5 (1992) (Stevens, J., dissenting) (quoting App. to Brief in Opposition 5A); see also DEPARTMENT OF STATE, *supra* note 7, at 613 (acknowledging that guerrillas in Guatemala engage in forced recruitment and that Guatemalan security forces are guilty of the "majority of the major human rights abuses, including extra-judicial killings, torture, and disappearances [apparently based on the] belief, whether factual or based on spurious information, that the victims were in some way supportive of or sympathetic to the guerrillas").

225. *Zacarias*, 921 F.2d at 847.

226. *Id.* at 852.

227. *Id.* at 850 (citations omitted).

The INS previously had succeeded in convincing at least one court of appeals to adopt a stringent "on account of" requirement. See *Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987) (affirming BIA denial of relief), *cert. denied*, 484 U.S. 826 (1987). The facts of *Campos-Guardado* show the requirement's potentially harsh results:

Ms. Campos testified about incidents of violence in El Salvador, focusing on one particular episode. . . . [When visiting her uncle, chairman of a local agricultural cooperative formed as a result of controversial land reform], an older woman and two young men with rifles arrived and knocked down the door. They dragged Ms. Campos, her uncle, a male cousin and three female cousins to the rim of the farm's waste pit. They tied all the victims' hands and feet and gagged the women. Forcing the women to watch, they hacked the flesh from the men's bodies with machetes, finally shooting them to death. The male attackers then raped the women, including Ms. Campos, while the woman who accompanied the attackers shouted political slogans. The assailants cut the victims loose, threatening to kill them unless they fled immediately. They ran and were taken to a hospital in San Salvador. Ms. Campos suffered a nervous breakdown and had to remain in the hospital 15 days. . . . [When

The Supreme Court reversed.<sup>228</sup> Justice Scalia, writing for the Court, framed the question as "whether a guerrilla organization's attempt to coerce a person into performing military service *necessarily* constitutes 'persecution on account of . . . political opinion.'" <sup>229</sup> The answer was an unequivocal no.

The Court treated the BIA's decision as a factual one that, as the INA provides, could not be disturbed "if supported by reasonable, substantial, and probative evidence on the record considered as a whole."<sup>230</sup> It stressed the narrowness of the substantial evidence standard of review: "[T]o obtain judicial reversal of the BIA's determination, [an asylum applicant] must show that the evidence . . . presented was *so compelling that no reasonable factfinder could fail to find the requisite fear of persecution*."<sup>231</sup> Applying this standard, the Court held that Elias-Zacarias

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she later visited her home], two young men arrived at the door. . . . Ms. Campos immediately recognized one of them as one of her assailants. . . . [H]e later sought her out several times and threatened to kill her and her family if she revealed his identity.

*Id.* at 287; see also ALEINIKOFF & MARTIN, *supra* note 146, at 811 n.36 (referring to *Campos-Guardado* as "stunning example of a nearly inexplicable hard-line decision, using highly restrictive 'on account of' doctrine"); Aleinikoff, *supra* note 156, at 8, 25 (criticizing *Campos-Guardado* in similar manner).

228. *Elias-Zacarias*, 112 S. Ct. at 817. Justice Scalia wrote for the majority, which included Chief Justice Rehnquist and Justices White, Kennedy, Souter and Thomas.

229. *Id.* at 814 (emphasis in original).

230. See *id.* at 815 (quoting 8 U.S.C. § 1105a(a)(4) (1988)). Some courts of appeals have treated the substantial-evidence standard as requiring more careful scrutiny, with correspondingly less deference, than the abuse-of-discretion standard applicable to judicial review of other BIA decisions. See, e.g., *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 216-18 (2d Cir. 1991); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282 n.8 (9th Cir. 1984). Others have applied the standard more deferentially. See, e.g., *Balazoski v. INS*, 932 F.2d 638, 643 (7th Cir. 1991); *M.A. v. United States INS*, 899 F.2d 304, 309 (4th Cir. 1990) (en banc); *Doe v. INS*, 867 F.2d 285, 290 (6th Cir. 1989); *McLeod v. INS*, 802 F.2d 89, 92 (3d Cir. 1986); see also Martin, *supra* note 147, at 1316 ("Whatever the precise [standard of review] formula, the actual vigor of scrutiny covers a wide range, from highly deferential to highly demanding.") (footnote omitted).

231. *Elias-Zacarias*, 112 S. Ct. at 817 (emphasis added). The Court emphasized elsewhere in the opinion that the BIA's decision could "be reversed only if . . . a reasonable fact-finder would have to conclude that the requisite fear of persecution existed," *id.* at 815 (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)), and that the evidence must "compel" the conclusion "that Elias-Zacarias had a well-founded fear that the guerrillas would persecute him *because of* . . . political opinion." *Id.* at 815 n.1 (emphasis in original).

In the single case cited to support these deferential rearticulations of the substantial evidence standard, the Court had held that the NLRB's factual determination was not supported by substantial evidence and emphasized that the standard requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Columbian Enameling*, 306 U.S. at 300 (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The 1938 *Consolidated Edison* case, in turn, has been employed to interpret the substantial evidence standard in the Administrative Procedure Act (APA), a practice supported by the APA's legislative history. See Breyer, *supra* note 57, at 852-53 (outlining pertinent legislative history).

failed to establish a well-founded fear of persecution on account of political opinion "with the degree of clarity necessary" to justify reversal of the Board's ruling.<sup>232</sup>

The Court rejected the conclusion that resistance to the leftist guerrillas' conscription efforts constituted political persecution.<sup>233</sup> It first cast doubt on whether Elias-Zacarias satisfied the threshold prerequisite of expressing a "political opinion" through his conduct. According to Justice Scalia, even a sympathizer might refuse to join the guerrillas "for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life."<sup>234</sup> Although not deciding whether neutrality might constitute a political opinion,<sup>235</sup> the Court speculated that a decision to remain neutral in the midst of hostilities might be based on "indifference, indecisiveness and risk-adverseness," rather than adherence to political belief.<sup>236</sup> It was not sufficient that Elias-Zacarias feared that if he joined the guerrillas the Guatemalan government would retaliate in the harshest ways against him and his family.<sup>237</sup> The Court further emphasized that the record lacked evidence suggesting that the guerrillas attributed any political

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In light of his views about the use of legislative history in statutory interpretation, *see supra* text accompanying notes 54-59, it seems curious for Justice Scalia to consider *Columbian Enameling*, which relied on *Consolidated Edison*, in analyzing the substantial evidence standard under the INA of 1952, rather than the APA of 1946. It is, however, consistent with his interpretation in a like fashion of similar language in different statutes. *See, e.g.,* *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (interpreting "relating to" language in Airline Deregulation Act; as the Court previously had interpreted similar language in the Employee Retirement Income Security Act).

Moreover, Justice Scalia's articulation of the substantial-evidence standard differs radically in tone from that of another former administrative law professor, Justice Frankfurter:

Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951).

232. *Elias-Zacarias*, 112 S. Ct. at 816.

233. *Id.* at 815.

234. *Id.* at 815-16.

235. *See id.* at 816 ("[W]e need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion.").

236. *Id.*

237. *Id.*

views to Elias-Zacarias based on his refusal to join.<sup>238</sup>

Though ruminating on the subject, the Court did not rest its holding on whether Elias-Zacarias expressed a political opinion. The Court instead pointed to the lack of evidence showing that the guerrillas had a motive to persecute him for his political views. That burden was not satisfied by the fact that the guerrillas' recruitment efforts were designed to field an army designed to overthrow the government.<sup>239</sup> Employing the plain meaning technique,<sup>240</sup> the Court found that

[t]he ordinary meaning of the phrase "persecution on account of . . . political opinion" . . . is persecution on account of the *victim's* political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion.<sup>241</sup>

Consequently, the "generalized 'political' motive" of the guerrillas failed to convince the Court that Elias-Zacarias established a "'well-founded fear' [of persecution on account of] political opinion."<sup>242</sup>

The Court held that the applicant must demonstrate a nexus between the persecutor's threatened persecution and the applicant's political opinion.<sup>243</sup> In other words, the evidence must show that the persecutor intended to persecute the applicant because of his or her political views. This bright-line motive requirement necessarily will reduce the number of persons eligible for asylum.<sup>244</sup> Despite requiring evidence

238. *Id.*; see *infra* note 279 (discussing the imputed political opinion doctrine).

239. *Elias-Zacarias*, 112 S. Ct. at 816.

240. See *id.* ("In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'") (citations omitted).

241. *Id.* (emphasis in original). It would appear that each asylum applicant in Justice Scalia's hypotheticals might be eligible for asylum, one based on "persecution on account of . . . religion" and the other based on "persecution on account of . . . political opinion." See *supra* text accompanying note 214 (quoting the INA's definition of "refugee").

242. *Elias-Zacarias*, 112 S. Ct. at 816.

243. *Id.* at 816-17.

244. See Aleinikoff, *supra* note 156, at 20-21; see also Linda Greenhouse, *Supreme Court Limits Political Asylum Claims*, N.Y. TIMES, Jan. 23, 1992, at A20 (discussing claims of immigration experts that *Elias-Zacarias* will adversely affect thousands of asylum claims). This is starkly illustrated by a court of appeals' reversal of its position taken before *Elias-Zacarias* that was vacated and remanded by the Supreme Court for further consideration in light of *Elias-Zacarias*. See *INS v. Canas-Segovia*, 112 S. Ct. 1152 (1992). Although originally finding that the asylum had established persecution, see *Canas-Segovia v. INS*, 919 F.2d 717 (9th Cir. 1990), the court on remand held that the asylum applicant had not established "persecution on account of . . . religion," despite the fact that he was a Jehovah's Witness who refused to join the Salvadoran army for religious reasons and feared persecution by the military because of his refusal to join. See *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) ("In light of *Elias-*

of the persecutor's motive, the Court granted some latitude to the asylum applicant in satisfying that evidentiary burden. The applicant need not proffer "direct proof of [the] persecutor's motives;"<sup>245</sup> however, because the statute so requires, he "must provide *some* evidence of it, direct or circumstantial."<sup>246</sup> Elias-Zacarias failed to do so and the Court upheld the BIA's decision.<sup>247</sup>

Emphasizing that Elias-Zacarias faced "a well-founded fear that he will be harmed, if not killed, if [deported] to Guatemala," Justice Stevens dissented.<sup>248</sup> He suggested that because the disputed question was legal rather than factual (whether, under the uncontroverted facts, Elias-Zacarias feared "persecution on account of . . . political opinion"), the BIA's decision should have been reviewed more carefully.<sup>249</sup> Justice Stevens then moved on to address the substantive issues.

As in previous attacks on plain meaning methodology,<sup>250</sup> Justice Stevens challenged the majority's political opinion dicta as a "narrow, grudging construction of the concept of 'political opinion' " inconsistent with the "basic approach" to the interpretation of the INA's asylum provisions in *INS v. Cardoza-Fonseca*, in which the Court considered everything from legislative history to international law.<sup>251</sup> According to Justice Stevens, "reasoning [similar to that in *Cardoza-Fonseca*] should resolve any doubts concerning the political character of an alien's refusal to take arms against a legitimate government in favor of the alien."<sup>252</sup>

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*Zacarias's* adoption of a motive requirement, *Canas-Segovia* can no longer prove religious persecution.") (citing *Elias-Zacarias*, 112 S. Ct. at 816-17); see also *Abedini v. INS*, 971 F.2d 188, 192 n.1 (9th Cir. 1992) (emphasizing that although "Iranian government's prosecution of individuals who propagate Western culture could be labeled a 'political act,' . . . [t]hat does not mean . . . that Iran's prosecution of individuals amounts to persecution") (citing *Elias-Zacarias*, 112 S. Ct. at 816); *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 239 (2d Cir. 1992) (affirming BIA denial of asylum and withholding of deportation to Yemen national fearing punishment under harsh laws motivated by religion, and citing *Elias-Zacarias* for proposition that generalized political motive of persecutors is insufficient to establish political persecution).

245. *Elias-Zacarias*, 112 S. Ct. at 816.

246. *Id.* at 817 (emphasis in original).

247. *Id.*

248. *Id.* (Stevens, J., dissenting). Justices Blackmun and O'Connor joined in the dissent. *Id.* (Stevens, J., dissenting).

249. *Id.* (Stevens, J., dissenting) ("The question of law that the case presents is whether respondent's well-founded fear is a 'fear of persecution on account of . . . political opinion' within the meaning of" INA.) (emphasis added) (footnote omitted).

250. See *supra* text accompanying notes 75-77.

251. *Elias-Zacarias*, 112 S. Ct. at 818 (Stevens, J., dissenting) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)); see also *supra* note 219 (discussing *Cardoza-Fonseca*).

252. *Elias-Zacarias*, 112 S. Ct. at 819 (Stevens, J., dissenting). In light of the Guatemalan government's questionable human rights record, some might object to Justice Stevens' characterization of it as a "legitimate" government. See, e.g., AMERICAS WATCH & PHYSICIANS FOR

Defining political opinion broadly to include negative conduct ("staying home on election day, . . . refusing to take an oath of allegiance, or . . . refusing to step forward at an induction center") as well as affirmative actions,<sup>253</sup> Justice Stevens attacked the majority's suggestion that refusal to join the guerrillas failed to constitute expression of a political opinion. In Justice Stevens's view, Elias-Zacarias expressed support for the government and antipathy toward the guerrillas.<sup>254</sup>

Justice Stevens concluded that, based on the guerrillas' threat, Elias-Zacarias possessed a "well-founded fear of persecution on account of . . . political opinion."<sup>255</sup> "[T]he statute does not require that an applicant for asylum prove exactly why his persecutors would act against him . . . ."<sup>256</sup> Because Elias-Zacarias expressed a political opinion and the guerrillas threatened to harm him unless he changed those views, Justice Stevens believed that he satisfied the statute's "on account of" requirement.<sup>257</sup>

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HUMAN RIGHTS, GUATEMALA: GETTING AWAY WITH MURDER (1991); AMERICAS WATCH, MESSENGERS OF DEATH: HUMAN RIGHTS IN GUATEMALA, NOVEMBER 1988-FEBRUARY 1990 (1990).

253. *Elias-Zacarias*, 112 S. Ct. at 818 (Stevens, J., dissenting) ("Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect.").

254. *Id.* at 819 n.5 (Stevens, J., dissenting) ("The statute speaks simply in terms of a political opinion and does not require that the view be well developed or elegantly expressed.").

255. *Id.* at 820 (Stevens, J., dissenting).

256. *Id.* (Stevens, J., dissenting). Justice Stevens quoted from a Ninth Circuit opinion, stating that

[i]t does not matter to the persecutors what the individual's motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.

*Id.* at 819 (Stevens, J., dissenting) (quoting *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287 (9th Cir. 1985)) (footnote omitted).

Justice Stevens differentiated *Elias-Zacarias* from a case in which a government seeks to conscript an individual for military service. *Id.* at 819 n.6 (Stevens, J. dissenting). In a cryptic footnote, he appears to distinguish "illegitimate" (the Afghanistan government while under Soviet occupation) from "legitimate" governments (El Salvador); those who flee conscription by "illegitimate" governments are eligible for relief, while those who flee service in the armed forces of "legitimate" governments are not. *See id.* (Stevens, J., dissenting) (citing BIA decisions making this distinction). Such distinctions have been criticized as inviting impermissible foreign policy judgments into the asylum process. *See Aleinikoff, supra* note 156, at 16-18.

257. *Elias-Zacarias*, 112 S. Ct. at 820 (Stevens, J., dissenting). At the same time, Justice Stevens made it clear that even if Elias-Zacarias established "persecution on account of . . . political opinion," he was not automatically entitled to asylum and that the agency had discretion to grant or deny relief. *Id.* at 817-18 & n.4 (Stevens, J., dissenting). The BIA, however, has substantially narrowed its discretion and established a rule that it rarely will deny asylum on discretionary grounds. *See In re Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987) ("ruling that,



*Elias-Zacarias* clearly reflects the plain meaning and deference doctrines at work. As suggested by the literalist approach, the Court ignored the plight of Elias-Zacarias and the many others like him who have fled war-torn Central America in fear for their lives. Although it was undisputed that if deported Elias-Zacarias faced a well-founded fear of persecution—political or otherwise—Justice Scalia disregarded the fact that Elias-Zacarias fled a politically-charged environment marred by daily violence, callously speculating that he simply may have resisted recruitment for “fear of combat, a desire to remain with [his] family and friends, [or] a desire to earn a better living in civilian life.”<sup>258</sup> Indeed, Justice Scalia appeared to relish finding Elias-Zacarias to be ineligible for relief.

The Court’s plain meaning interpretation of the Refugee Act unfortunately overlooks the heavy evidentiary burden on asylum applicants, who often have fled their native lands with little more than the clothes on their back. For obvious reasons, it is difficult to establish the intent of persecutors, who often are short on words, rarely state their true motivations, and historically have been known to engage in mass terrorism with little regard for the individual’s political views.<sup>259</sup> Put bluntly, the Court’s plain meaning reading of the INA’s text was not only naked of context and devoid of reality, but also indifferent to the harshness of its impact.

Moreover, as Justice Stevens observed, *Elias-Zacarias*’s plain meaning approach is wholly inconsistent with the multifaceted (if not free-wheeling) approach of *INS v. Cardoza-Fonseca*, which included consideration of legislative history, Congress’s purpose, and international law, all of which were relevant to Congress in passing the Refugee Act.<sup>260</sup> The majority failed to reconcile *Cardoza-Fonseca*’s liberal interpretation of the well-founded fear of persecution standard with *Elias-Zacarias*’s narrow “on account of” construction. Consideration of extrajudicial materials was particularly appropriate because the broad language of the statute did not inexorably lead to the conclusion that Elias-Zacarias was ineligible for relief. Fairly read, the language was at best ambiguous on the point in question. Contrary to the statutory canon that ambiguities in deportation statutes be interpreted *in favor of* immi-

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absent “most egregious of adverse factors,” a refugee is entitled to favorable exercise of discretion).

258. *Elias-Zacarias*, 112 S. Ct. at 816.

259. See, e.g., AMNESTY INT’L, KAMPUCHEA: POLITICAL IMPRISONMENT AND TORTURE 16-18 (1987) (describing often indiscriminate human rights violations by communist government of Kampuchea).

260. See *supra* note 219.

grants,<sup>261</sup> the Court interpreted this ambiguity *against* the asylum-seeker.<sup>262</sup>

A reasonable interpretation of the Refugee Act of 1980 would have been based, at least in part, on evidence of Congressional directive. The Court failed to consider the humanitarian purposes behind Congress's passage of the Refugee Act, which amended the INA to provide for asylum for the first time in American law.<sup>263</sup> The legislative history further reveals that the Refugee Act was designed to conform United States law with international law,<sup>264</sup> specifically the United Nations Protocol Relating to the Status of Refugees.<sup>265</sup> International law, in turn, suggests that nations should be liberal, not grudging, when looking to the motives behind a persecutor's threats.<sup>266</sup>

Despite the holding of *Elias-Zacarias*, one would hope that the INS, BIA, and the courts of appeals will take note of the Supreme Court's point that the applicant need not offer *direct* evidence of the persecutor's motives.<sup>267</sup> As fact-finders do in making the difficult inquiry into the "intent" of persons in other contexts,<sup>268</sup> immigration judges should weigh *circumstantial* evidence and the totality of the circumstances in deciding whether reasonable inferences, often based on patterns and

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261. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987) (citing authority); see also CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 166-67, 187 (1990) (discussing statutory canon that laws be interpreted in favor of discrete and insular minorities); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1032-34 (1989) (same). For discussion of the selective use of canons of statutory construction by the Rehnquist Court, see *infra* note 371.

262. But cf. Aleinikoff, *supra* note 156, at 27-28 (advocating that BIA generally should grant asylum to those who have established likelihood of persecution if deported).

263. See generally Anker & Posner, *supra* note 197 (discussing the legislative history of the Refugee Act of 1980).

264. See *supra* text accompanying notes 199-201.

265. United Nations Protocol Relating to the Status of Refugees, *opened for accession* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

266. See Aleinikoff, *supra* note 156, at 11 ("The history of [the relevant treaties] . . . provides no support for a narrow reading of the grounds of persecution, but rather displays an intent to write a definition of refugee broad enough to cover then-existing victims of persecution."); see also Walter Kalin, *Refugees and Civil Wars: Only a Matter of Interpretation?*, 3 INT'L J. REFUGEE L. 435, 449 (1991) ("For courts or officials it is very often impossible to determine the intentions of authorities of a foreign State. Even if this can be done, the question arises as to whose intention is decisive: internationally relevant actions of States often cannot be reduced to a decision of an individual person . . .").

267. See *INS v. Elias-Zacarias*, 112 S. Ct. 812, 816 (1992).

268. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (equal protection); *Herbert v. Lando*, 441 U.S. 153, 165 (1979) (First Amendment). Circumstantial evidence, missing from the record in *Elias-Zacarias*, could include reports from reputable human rights organizations. These reports might establish that guerrilla organizations persecute those who refuse to serve in their forces because they impute to them certain political views, such as sympathy for the government. See *infra* note 279 (discussing imputed political opinion doctrine).

practices of conduct, may be made about the persecutor's motive. Obviously, not every Jew in Hitler's Germany should have been forced to bear the extraordinary, generally insurmountable burden of establishing that the Nazi government singled out that particular individual for religious persecution. In fact, INS regulations acknowledge that, regardless of the particular situation of the individual, heinous persecutors sometimes target entire classes of people for persecution.<sup>269</sup>

By employing a plain meaning approach, *Elias-Zacarias* reaches a result quintessentially deferential to the BIA. The Court applied the substantial-evidence standard of review because in its estimation, the BIA decision was a factual one. But as Justice Stevens and the parties viewed it,<sup>270</sup> the question in dispute was a legal one: on the factual record before the Court, did *Elias-Zacarias* establish the statutory prerequisite of "persecution on account of . . . political opinion"? Despite *Chevron*, the Court has been willing at times to subject "legal" interpretations of agencies to more demanding scrutiny than mere fact-findings.<sup>271</sup> Such scrutiny was warranted in *Elias-Zacarias*.

But even assuming that the Court applied the correct review standard, it re-articulated the substantial-evidence standard in a way most deferential to the decisions of the BIA.<sup>272</sup> The Court essentially approached the case as simply another "review of agency action" case. No particular attention was paid to the nature or purpose of the particular statute being applied, to the evidence of bias by the INS and the BIA in asylum decisionmaking, or to the delicate life and liberty interests at stake.

Most importantly, the Court failed to address facts that seriously undermine deferral to the BIA, particularly the Board's inconsistent application of the same statutory language depending on the nationality of the applicant. Specifically, the Board in the past was willing to grant asylum to persons who resisted conscription into Afghanistan's Soviet-

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269. See 8 C.F.R. § 208.13(b)(2)(i)(A) (1992) (providing that asylum applicant need not prove that he or she has been singled out for persecution if it can be shown that there is a pattern and practice of persecution of similarly situated persons).

270. See Brief for Petitioner, 9-11, *INS v. Zacarias*, 112 S. Ct. 812 (1992) (No. 90-1342); Brief for Respondent, 6-9, *Zacarias* (No. 90-1342); Reply Brief for Petitioner at 18 n.13, *Zacarias* (No. 90-1342); see also *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990) (per curiam) (treating similar question as "legal" in nature).

271. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); see also *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (reviewing agency interpretation as "purely legal question of statutory interpretation"). But see *Merrill*, *supra* note 26, at 986 (criticizing *Cardoza-Fonseca* on this point and discussing inconsistency in caselaw about review of "pure" questions of law versus application of law).

272. See *supra* note 231; *supra* text accompanying notes 230-32.

backed army<sup>273</sup> while rejecting those, such as Elias-Zacarias, who fled a United States-supported regime in Central America under remarkably similar circumstances.<sup>274</sup> Even under *Chevron's* reign, the Rehnquist Court generally has refused to defer to inconsistent statutory interpretations by agencies in adjudications.<sup>275</sup> That, however, was not its inclination in *Elias-Zacarias*.

One can only hope that the Court's deferential approach in *Elias-Zacarias* does not signal a return to an era of executive branch domination over immigration matters.<sup>276</sup> The horrendous treatment of immigrants at various times in American history shows the need for meaningful judicial review of the executive branch's treatment of refugees.<sup>277</sup> The Court's deferential approach, however, undoubtedly will tend to discourage appeals and encourage courts of appeals to defer to agency decisions with a minimum of review.

*Elias-Zacarias*, of course, did not change any of the INA's judicial review requirements. The court must review the record as a whole to ensure that the agency's legal conclusions are consistent with the mandate of the INA, as amended by the Refugee Act. Nor can the court defer to the agency's fact findings, unless, as the statute requires, they are "supported by reasonable, substantial, and probative evidence on the record considered as a whole."<sup>278</sup> Whether the agencies and the lower courts will adhere to these standards, in light of the heavy deference overtones in the Court's opinion, remains to be seen.<sup>279</sup>

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273. See *In re Salim*, 18 I. & N. Dec. 311 (BIA 1982); see also *In re Izatula*, No. 3127 (BIA 1990) (interim decision) (recognizing that refusal to serve in Afghanistan military prior to the withdrawal of Soviet forces could serve as the basis for granting asylum).

274. See Brief for Amicus Curiae American Immigration Lawyers Association In Support of Respondent, 8-9, *Zacarias* (No. 90-1243) (outlining inconsistencies in detail).

275. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1234 (1991); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring) ("[T]he principles announced in an adjudication cannot be departed from in future adjudications without reason.").

276. See *supra* text accompanying notes 130-35 (discussing plenary power doctrine). *Elias-Zacarias*, however, already has been cited by reviewing courts affirming BIA decisions for the proposition that the substantial evidence standard is a very deferential one. See, e.g., *Ravindran v. INS*, 1992 U.S. LEXIS 24113 (1st Cir. Sept. 30, 1992); *Nathan v. INS*, 1992 U.S. App. LEXIS 25207 (10th Cir. Sept. 29, 1992) (unpublished mem.); *Castillo-Bendana v. INS*, 1992 U.S. App. LEXIS 20222 (9th Cir. Aug. 20, 1992); *Sivaankaran v. INS*, 972 F.2d 161, 163 (7th Cir. 1992); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992); *Kyambadde v. INS*, No. 91-9505, 91-9506, 1992 U.S. App. LEXIS 16046, at \*5 (10th Cir. July 6, 1992); *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992); *Ahmadi v. Board of Immigration Appeals*, No. 91-1823, 1992 U.S. App. LEXIS 12332, at \*9-10 (4th Cir. June 1, 1992); *Narayan v. INS*, No. 91-70034, 1992 U.S. App. LEXIS 7109, at \*5-6 (9th Cir. Apr. 9, 1992).

277. See *supra* text accompanying notes 130-35.

278. INA § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1988).

279. Besides adopting broad plain meaning and deference rules applicable to asylum cases,

In terms of black-letter asylum law, the Court's decision in *Elias-Zacarias* tells us very little. The only "holding" of the case is that an unfortunate young Guatemalan failed to provide sufficient evidence to justify reversal of the BIA's finding that *he* did not establish a "well-founded fear of persecution on account of . . . political opinion." Numerous questions remain unanswered. Nevertheless, the decision offers some troubling insights into the Rehnquist Court's mindset about judicial review of BIA asylum rulings. According to the Court, the INA should be interpreted like any other law, and the BIA's asylum rulings deserve the same deference as that of any other agency. The Court is unwilling to inquire further, and neither should the lower courts. Such a result tends to minimize review costs, discourage litigation, and reduce appeals of asylum decisions. At the same time, it sanctions deportation of Central Americans such as Elias-Zacarias to countries where they have every reason to believe that they will be persecuted.

## 2. *INS v. Doherty*

Joseph Patrick Doherty, once a member of the Provisional Irish Republican Army (PIRA), was convicted *in absentia* in the United King-

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the majority opinion included disturbing dicta concerning the interpretation of the asylum provisions of the INA. The Court suggested that neutrality never may constitute the expression of a political opinion, despite acknowledging that such speculation was completely unnecessary to its holding. See *INS v. Elias-Zacarias*, 112 S. Ct. 812, 816 (1992). The Court's dicta, therefore, should not be read as silently overruling well-established lower court precedent that, for asylum purposes, affirmative conduct evidencing neutrality in certain circumstances may constitute a political opinion. See, e.g., *Novoa-Umania v. INS*, 896 F.2d 1,3 (1st Cir. 1990); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984). As the Court emphasized, the record in *Elias-Zacarias* was somewhat opaque about whether the applicant held a political opinion of any sort. The BIA, however, citing *Elias-Zacarias*, has held that a former guerrilla who received a series of death threats upon leaving the group failed to establish that he expressed a political opinion. Therefore, the applicant could not demonstrate a "well-founded fear of persecution on account of . . . political opinion." See *In re R-O-*, No. 3170 (BIA Apr. 22, 1992) (interim decision).

Further, the Court cryptically placed in question whether the imputation of a political opinion to Elias-Zacarias by the guerrillas satisfies the "persecution on account of . . . political opinion" requirement. *Elias-Zacarias*, 112 S. Ct. at 816 ("Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously believed that Elias-Zacarias' refusal [to join] was politically based."). As recognized in the lower courts, the "imputed political opinion" doctrine works as follows: when persecutors for some (perhaps erroneous) reason impute a political opinion to an asylum-applicant, the imputation may support a claim of "persecution on account of . . . political opinion." See, e.g., *Alvarez-Flores v. INS*, 909 F.2d 1, 4 (1st Cir. 1990); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516-17 (9th Cir. 1985); see also OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, *supra* note 219, ¶¶ 80-83 (1979) (stating that government's persecution of persons to whom it attributes political views different from those of the government constitutes persecution on account of political opinion). Despite the dicta in *Elias-Zacarias*, the doctrine has remained viable in at least one court of appeals. See *Canas-Segovia v. INS*, 970 F.2d 599, 601-02 (9th Cir. 1992).

dom of killing a British soldier in battle.<sup>280</sup> Ruling that Doherty's crimes constituted "political offenses" precluding extradition under the applicable treaty, the district court rejected the attempt of the United States to extradite Doherty to the United Kingdom.<sup>281</sup> Unwilling to abandon the effort to return Doherty to England, the INS instituted deportation proceedings. With the approval of the immigration court and the BIA, Doherty agreed to be deported to Ireland, rather than the United Kingdom, and to waive any claim to asylum and withholding of deportation.<sup>282</sup> Because he believed that Doherty's deportation to Ireland "would be prejudicial to United States' interests," Attorney General Edwin Meese reversed the BIA's ruling.<sup>283</sup>

On remand, the BIA granted a motion to reopen deportation proceedings so that Doherty would be permitted to apply for asylum and withholding of deportation.<sup>284</sup> A new Attorney General, Richard Thornburgh, once again reversed.<sup>285</sup> Addressing Doherty's asylum claim, he emphasized that United States foreign policy mandated Doherty's return to the United Kingdom and justified a negative exercise of discretion.<sup>286</sup> The Attorney General further concluded that Doherty was ineligible for withholding of deportation because of his PIRA activities.<sup>287</sup> In denying those claims, the Attorney General admittedly did not consider the possible political persecution that Doherty might suffer if deported to the United Kingdom.<sup>288</sup>

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280. 908 F.2d 1108, 1110-11 (2d Cir. 1990), *rev'd*, 112 S. Ct. 719 (1992).

281. *See In re Doherty*, 599 F. Supp. 270, 275 (S.D.N.Y. 1984).

282. *See Doherty*, 908 F.2d at 1111-12.

283. *See id.* at 1112; *see also* 8 C.F.R. § 3.1(h) (1992) (authorizing Attorney General review). Unlike the highly unusual intervention in *Doherty*, the Attorney General reviews relatively few cases and usually only resolves legal questions. *See, e.g., In re Belenzo*, 17 I. & N. Dec. 374 (Att'y Gen. 1981).

284. *Doherty*, 908 F.2d at 1112; *see* 8 C.F.R. § 3.2 (1992) (authorizing motion to reopen deportation proceedings).

285. *See Doherty*, 908 F.2d at 1113.

286. *See id.* at 1119-21. Attorney General Thornburgh emphasized that "it is 'the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment.' . . . Deporting [Doherty] to the United Kingdom would unquestionably advance this important policy.'" *Id.* (citation omitted); *see supra* text accompanying note 214 (quoting asylum provisions of INA delegating discretion to Attorney General to grant asylum to "refugee").

287. *See Doherty*, 908 F.2d at 1116-17. The Attorney General based his conclusion on the finding, without a hearing, that Doherty had committed a "serious nonpolitical crime outside the United States," INA § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C) (1988), and engaged in political persecution, *see id.* § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A). *See Doherty*, 908 F.2d at 1116-17.

288. *See Doherty*, 908 F.2d at 1114-15. These claims are not frivolous on their face. The Department of State has acknowledged that British courts have convicted PIRA members of alleged terrorist offenses based on coerced confessions and false evidence and that the right to

The United States Court of Appeals for the Second Circuit reversed.<sup>289</sup> Finding that through passage of the Refugee Act, "[C]ongress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum," the court held that the Attorney General improperly considered foreign policy in finding Doherty *per se* ineligible for asylum.<sup>290</sup> The court also found that because of the mandatory nature of withholding of deportation, the Attorney General lacked discretion to deny Doherty the opportunity to apply for such relief.<sup>291</sup>

The Supreme Court, in a decision authored by Chief Justice Rehnquist, reversed.<sup>292</sup> A majority of the Court joined only one portion of the Chief Justice's opinion,<sup>293</sup> which in large part recounted the teachings of the Court's precedents on motions to reopen.<sup>294</sup> Because of the fragmented nature of the opinion, *Doherty* held only that the Attorney General did not abuse his discretion in denying reopening on the ground that Doherty "failed to adduce new material evidence or . . . to satisfactorily explain his previous withdrawal of" his asylum and withholding of deportation claims.<sup>295</sup> In so holding, the Court emphasized that the Attorney General acted within "the *broad* discretion vested in him by the applicable regulations."<sup>296</sup> Through this reasoning, the Court declined to decide whether the Attorney General properly found Doherty ineligible for relief and, more specifically, whether foreign policy might be weighed in the exercise of discretion on an asylum claim.<sup>297</sup>

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jury trial has been suspended for certain "terrorist-related" offenses in Northern Ireland. See DEPARTMENT OF STATE, *supra* note 7, at 1326-27.

289. *Doherty*, 908 F.2d at 1122.

290. *Id.* at 1119. In so doing, the court emphasized that the Attorney General may not weigh "considerations that Congress could not have intended to make relevant" when exercising discretion on an asylum claim. *Id.* at 1117-18 (quoting *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966)) (quoting *United States ex rel. Kaloudis v. Shaughnessey*, 180 F.2d 489, 491 (2d Cir. 1950)).

291. *Id.* at 1117. The Second Circuit affirmed Attorney General Meese's conclusion that United States foreign policy concerns precluded Doherty's deportation to Ireland. *Id.* at 1113.

292. *INS v. Doherty*, 112 S. Ct. 719 (1992). Justice Thomas took no part in the consideration or decision of the case. *Id.* at 721.

293. Justices White, Blackmun, O'Connor, and Kennedy joined Part I of Chief Justice Rehnquist's opinion, the only part that commanded a majority. *Id.*

294. *Id.* at 724-25. The Court discussed the precedents set by *INS v. Abudu*, 485 U.S. 94, 99 n.3, 104-05, 107-08 (1988), *INS v. Rios-Pineda*, 471 U.S. 444, 446, 449-50 (1985), and *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

295. *Doherty*, 112 S. Ct. at 725.

296. *Id.* at 722 (emphasis added).

297. *Id.* at 724. In arguing to the Supreme Court, the INS unequivocally insisted that, even if the applicant has established a well-founded fear of persecution, the Attorney General may deny asylum because of United States foreign policy. See Official Testimony of Proceedings Before the Supreme Court of the United States, *INS v. Doherty*, at 25, l. 20-25 (Oct. 16,

A motion to reopen is a privilege bestowed by regulation, rather than a statutory right.<sup>298</sup> The regulation grants the administrative agent the authority to determine whether "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."<sup>299</sup> According to the Court, the Attorney General's "broad discretion" on motions to reopen<sup>300</sup> was justified on the ground that such motions

are disfavored for the same reasons as are petitions for rehearing, and motions for a new trial on the basis of newly discovered evidence. . . . *This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.*<sup>301</sup>

The Court previously had recognized three justifications for denial of motions to reopen, with BIA denial on any of these grounds reviewed for abuse of discretion: "[1] failure to establish a prima facie case for the relief sought, [2] failure to introduce previously unavailable, material evidence, and [3] a determination that even if these requirements were satisfied, the movant would not be entitled to the *discretionary grant of relief which he sought*."<sup>302</sup> In *Doherty*, however, the Court extended the abuse-of-discretion standard to rulings on motions to reopen to apply for a *mandatory* form of relief (withholding of deportation), as well as a discretionary one (asylum).<sup>303</sup>

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1991) (on file with the North Carolina Law Review Association). Congress, however, clearly intended the Refugee Act to eliminate foreign policy from asylum decisionmaking. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 434-35 (1987); *INS v. Stevic*, 467 U.S. 407, 427 (1984); Johnson, *supra* note 6, at 291-92 n.47; Martin, *supra* note 147, at 1261-62; Schuck, *supra* note 208, at 7; see also Anker, *supra* note 215, at 6-16 (discussing limited nature of discretion on asylum claims).

298. See *Doherty*, 112 S. Ct. at 724.

299. 8 C.F.R. § 3.2 (1987).

300. *Doherty*, 112 S. Ct. at 724 (quoting *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985)).

301. *Id.* at 724-25 (citations omitted) (emphasis added). Note that this is not necessarily true if the immigrant is barred from employment, see *infra* text accompanying notes 380-449 (discussing *INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551 (1991)), or remains in detention, see *infra* text accompanying note 325, while proceedings are pending.

302. *Doherty*, 112 S. Ct. at 725 (citing *INS v. Abudu*, 485 U.S. 94, 104-05 (1988)) (emphasis added).

303. See *id.*; *supra* text accompanying notes 214-20 (discussing asylum and withholding of deportation).

In Part II of his opinion, which was joined only by Justices White, Blackmun and O'Connor, Chief Justice Rehnquist concluded that neither the Attorney General's refusal to deport Doherty to Ireland nor the change in Irish extradition law that ensured his return to the United Kingdom constituted "new material evidence" necessary for reopening. See *Doherty*, 112 S. Ct. at 725-26 (plurality opinion). In reaching that conclusion, the plurality further emphasized that



In a concurring and dissenting opinion,<sup>304</sup> Justice Scalia agreed that the Attorney General had the discretion to conclude that "Doherty is a sufficiently *unsavory character* [so as] not to be granted asylum in this country," and so could refuse to reopen the proceedings to allow Doherty to apply for asylum.<sup>305</sup> Withholding of deportation, however, stood on different footing.<sup>306</sup> Although a decision on a motion to reopen is discretionary, "[e]ven discretion . . . has its legal limits."<sup>307</sup> The critical distinction to Justice Scalia between *Doherty* and previous reopening decisions was that the latter involved attempts to apply for discretionary, not mandatory, relief.<sup>308</sup> Doherty therefore should be given the opportunity to present the withholding of deportation claim.<sup>309</sup>

*Doherty* is an extraordinary case with a legally and factually com-

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[t]he BIA is simply a statutory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes. He is the final administrative authority in construing the regulations, and in deciding questions under them. . . . The mere fact that he disagrees with a conclusion of the BIA in construing or applying a regulation cannot support a conclusion that he abused his discretion.

*Id.* at 726-27 (plurality opinion) (citation omitted) (emphasis added); *see also supra* text accompanying notes 152-78 (discussing BIA's lack of independence).

In Part III of the opinion, Chief Justice Rehnquist and Justice Kennedy argued that the Attorney General did not abuse his discretion in finding, as grounds for denying reopening, that Doherty waived his claims for relief "by withdrawing them at the first hearing to obtain a tactical advantage." *Doherty*, 112 S. Ct. at 727.

304. *Doherty*, 112 S. Ct. at 728 (Scalia, J., concurring in judgment in part and dissenting in part). He was joined by Justices Stevens and Souter.

305. *Id.* at 730 (Scalia, J., concurring in judgment in part and dissenting in part) (emphasis added).

306. *See id.* at 728 (Scalia, J., concurring in judgment in part and dissenting in part).

307. *Id.* (Scalia, J., concurring in judgment in part and dissenting in part).

308. *See id.* at 729-30 (Scalia, J., concurring in judgment in part and dissenting in part) (stating "in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, *but not withholding of deportation*), the BIA may leap ahead . . . and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief"') (quoting *INS v. Abudu*, 485 U.S. 94, 104-05 (1988)) (emphasis in original). In this analysis, Justice Scalia emphasized that Congress amended § 243(h) of the INA to conform domestic law to the United States obligations under the United Nations Protocol Relating to the Status of Refugees. *See id.* at 729 (Scalia, J., concurring in judgment in part and dissenting in part).

309. *Id.* at 730 (Scalia, J., concurring in judgment in part and dissenting in part). Justice Scalia also disagreed with the majority's conclusion that by withdrawing his claims, Doherty waived them. Because the waiver was conditioned on deportation to Ireland, the Attorney General's rejection of Doherty's deportation to Ireland constituted material "new evidence" to Justice Scalia. *See id.* at 732-33 (Scalia, J., concurring in judgment in part and dissenting in part). Justice Scalia thought it arbitrary to allow the Attorney General to consider evidence proffered by the INS for the first time on appeal while at the same time precluding Doherty from applying for asylum because of an alleged procedural default. *Id.* at 733-35 (Scalia, J., concurring in judgment in part and dissenting in part).

Justice Scalia would have remanded for further proceedings to determine whether Doherty committed a "serious nonpolitical crime" making him ineligible for withholding of de-

plex set of circumstances rarely, if ever, duplicated in an asylum case.<sup>310</sup> The Court held only that, in large part because of his initial agreement to deportation, Doherty failed to establish that the Attorney General abused his discretion in denying a motion to reopen. Nevertheless, the Court's reasoning in *Doherty* has some troubling implications.

Using plain meaning analysis, the Court summarily concluded that the regulation bestows not simple "discretion" but "broad discretion" on the Attorney General on motions to reopen.<sup>311</sup> That conclusion, consistent with the Rehnquist Court's docket-clearing mindset, severely limits review on such motions. Moreover, the Court held that an abuse-of-discretion standard of review applies to denials of motions to reopen even if it precludes a hearing on a claim for relief that Congress expressly made mandatory.<sup>312</sup> The Court effectively allowed the Attorney General, under circumstances strongly suggesting political maneuvering, to exercise discretion granted by a *regulation* to deny an immigrant the opportunity to apply for relief. That relief, however, was mandatory under a *statute* passed by Congress. Congress understandably could not have envisioned that the Attorney General could lawfully circumvent its express directive.<sup>313</sup>

In utilizing a plain meaning approach, the Court reached a result

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portation. *Id.* at 735-36 (Scalia, J., concurring in judgment in part and dissenting in part) (citing 8 U.S.C. § 1253(h)(2)(C) (1988)).

310. The case also is extraordinary in the amount of press attention that it attracted, *see, e.g.*, James Barron, *I.R.A. Fugitive Sent to Belfast from U.S. Jail*, N.Y. TIMES, Feb. 20, 1992, at A1; Wade Lambert, *The Drawn-Out Case of an Irish Guerrilla Reaches High Court*, WALL ST. J., Oct. 17, 1991, at 1, as well as the political interest that it sparked, *see, e.g.*, S. Con. Res. 62, 101st Cong., 1st Sess. (1989) (entitled "Relating to Political Asylum to Joseph Patrick Doherty," Brief for Amici Curiae Members of the United States Senate and Members of United States House of Representatives in Support of Respondent, *Doherty* (No. 90-925) (joined by 132 members of Congress); Brief of Amici Curiae, *Doherty v. United States Dep't of Justice*, 908 F.2d 1108 (2d Cir. 1990) (Nos. 88-4084, 89-4092) (joined by 46 members of Congress).

311. In response to that signal, lower courts and the BIA have cited *Doherty* for the proposition that great deference to the BIA's rulings on motions to reopen is warranted. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1023-24 (9th Cir. 1992); *Wijeratne v. INS*, 961 F.2d 1344, 1347-48 (7th Cir. 1992); *In re Caelho*, No. 3172 (BIA April 30, 1992) (interim decision).

312. In so doing, the majority effectively ignored what it recognized in *INS v. Stevic*, 467 U.S. 407, 413, 425-26 (1984): that the Refugee Act expressly amended the INA to make withholding of deportation a mandatory remedy in order to comply with international law and eliminated any and all discretion to deny relief to an applicant who has established a clear probability of persecution. *See supra* text accompanying notes 214-20.

313. Of course, the Attorney General may promulgate and apply reasonable regulations governing the procedure for applying for mandatory relief without reopening every matter in which the applicant seeks to apply for withholding of deportation. But, when the circumstances suggest that the agency is exercising discretion under a procedural regulation that appears designed to avert Congressional mandate, denial of the opportunity to apply for such relief is most problematic.

deferential to the INS. Similar to the approach in *Elias-Zacarias*,<sup>314</sup> the Court treated the Attorney General's ruling in *Doherty* as simply another "review of agency action" case. The numerous procedural red flags made it clear that *Doherty* deserved much more than the Court's cursory treatment. *Doherty* is unlike any other case addressed by the Supreme Court involving a motion to reopen in that it is the only one in which the Attorney General personally intervened on one, much less two, occasions.<sup>315</sup> This is not a situation in which it can be said with much confidence that the courts should defer to the Attorney General's expertise.

Having lost in the attempt to extradite *Doherty* to the United Kingdom,<sup>316</sup> the Attorney General reversed the BIA in order to return *Doherty*. To do so, the Attorney General expressly invoked foreign policy desires as the rationale for *Doherty*'s deportation. Such motivations, however, violate the neutral aspirations of the Refugee Act.<sup>317</sup> Employing the familiar deference theme, the Court ignored the possibility that the Attorney General's foreign policy interests motivated his narrow reading of the applicable regulations and statutes.<sup>318</sup> The clear potential for bias, particularly when combined with the gravity of the life and liberty interests implicated in an asylum and withholding of deportation decision, justified much more than simple deference.<sup>319</sup> In light of such facts, the Attorney General's extraordinary intervention cried out for rigorous, not passive, review.

The *Doherty* Court's deferential approach to the Attorney General's decisions through transformation of discretion to broad discretion in the motion to reopen regulation is ominous. In that vein, in agreeing with a unanimous Court on denial of the motion to reopen to apply for asylum, Justice Scalia found it sufficient to justify the exercise of discretion that *Doherty* was an "unsavory character,"<sup>320</sup> a conclusory characterization made without a hearing. The BIA, however, has narrowed its discretion significantly and never has claimed the authority to deny asylum on such amorphous impressions.<sup>321</sup> Read literally, *Doherty* suggests that the

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314. See *supra* text accompanying notes 221-79.

315. See *supra* text accompanying notes 280-88.

316. See *supra* text accompanying note 281.

317. See *supra* text accompanying notes 199-201.

318. The Court further ignored evidence that the Executive Branch's asylum decisions as a whole reflect bias of that sort. See generally Johnson, *supra* note 6, at 320-60 (reviewing asylum decisions of the executive branch and concluding that "[f]oreign policy bias . . . permeates" such decisions).

319. See *supra* text accompanying notes 41-43.

320. *INS v. Doherty*, 112 S. Ct. 719, 730 (1992) (Scalia, J., concurring in judgment in part, dissenting in part).

321. See *In re Pula*, 19 I. & N. Dec. 467, 473-74 (BIA 1987).

facially open-ended delegations of discretion to the executive branch so common to the INA should be construed virtually without limits.<sup>322</sup> Even though such a reading would be contrary to the clear weight of authority,<sup>323</sup> the Court suggested that the plain meaning of "discretion" is "unlimited discretion."

Perhaps most distressing is *Doherty's* bottom line. Joseph Patrick Doherty's simple desire to avoid return to the United Kingdom resulted in a procedural morass with clear political overtones in which he was denied a hearing on his claims for relief. At no time did any agency hear evidence of Doherty's claims of alleged political persecution. Nor did the Attorney General appear particularly concerned with that possibility. Rather than recognizing that Doherty's life and liberty were at issue in the administrative proceeding, the Court implied that immigrants generally engage in dilatory tactics to delay their deportation.<sup>324</sup> In light of the fact that Doherty remained imprisoned during eight years of extradition and deportation proceedings,<sup>325</sup> there was little evidence supporting such a claim.

All in all, *Doherty* would appear to have limited precedential value. It remains to be seen how the Court, and the lower courts, will approach similar questions in the future. *Doherty's* strong plain meaning and deference themes send ominous signals about how this Court will apply those doctrines to immigration law. The decision also shows that, despite the most obvious danger signs of impermissible bias, the Court will not heighten its review of agency action. An agency decision is an agency decision . . . .

#### B. (No) Attorneys' Fees for Refugees: *Ardestani v. INS*

Charges persist that the INS engages in tactics with the impact, and perhaps the intent, of deterring immigrants, particularly asylum-seekers, from pursuing their claims to relief from deportation.<sup>326</sup> For example, in *Commissioner, INS v. Jean*,<sup>327</sup> the Court found that the INS, in defend-

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322. See *supra* text accompanying notes 202-05.

323. See *supra* text accompanying notes 202-05.

324. See *Doherty*, 112 S. Ct. at 724-25; *supra* text accompanying note 301.

325. *Doherty v. Thornburgh*, 943 F.2d 204, 205 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 1254 (1992).

326. See *supra* text accompanying notes 130-90.

327. 496 U.S. 154, 165-66 (1990) (holding that INS was required to pay attorneys' fees under the Equal Access to Justice Act in class action). As the district court summarized,

[t]he government took an unusually unwavering and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From

ing its detention policies toward Haitian asylum-seekers and expedited exclusion proceedings, asserted wholly unjustified legal positions that required nearly ten years of litigation. Some have even claimed that the INS resists the vast majority of asylum applications without regard to the merits of individual claims.<sup>328</sup> One way of curbing such bureaucratic abuse might be to require the INS to pay the attorneys' fees of the applicants when its opposition is wholly unfounded. In *Ardestani v. INS*,<sup>329</sup> however, the Supreme Court limited the ability to use fees as a deterrent to INS misconduct.

Rafef-Rafie Ardestani, an Iranian woman of Bahai faith, sought asylum in the United States.<sup>330</sup> The State Department concluded that Ardestani's asylum application established a "well-founded fear of perse-

pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.

Louis v. Nelson, 646 F. Supp. 1300, 1318 (S.D. Fla. 1986); see also Jean v. Nelson, 863 F.2d 759, 762 (11th Cir. 1988) (describing case as a "long, complex, and bitterly contested lawsuit").

The executive branch's course of conduct in litigation involving Haitians seems to have been undeterred by the attorneys' fees award in *Jean*. The United States recently sought monetary sanctions under Rule 11 from plaintiffs' attorneys, including Yale Law School Professor Harold Hongju Koh, for filing an action challenging the executive's interdiction and repatriation of Haitians, and sought a \$10 million bond as security for the action, the largest ever in the Second Circuit. See Marcia Chambers, *Sua Sponte*, NAT'L L.J., May 4, 1992, at 15; see also Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1338-53 (1986) (suggesting that Rule 11 sanctions chill vigorous advocacy, particularly in civil rights actions). The Court of Appeals for the Second Circuit ultimately ruled in favor of plaintiffs. See Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1367 (2d Cir.), cert. granted, 113 S. Ct. 52 (Oct. 5, 1992).

328. See John P. Stern, Note, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459, 1471 (1988) (describing pattern of "vigorous opposition [by INS] to adjudicated asylum claims, often irrespective of the merits").

329. 112 S. Ct. 515 (1991). *Ardestani* is indicative of the Rehnquist Court's hostility the toward awarding of attorneys' fees, a practice designed to encourage certain types of litigation. See also, *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992) (rejecting multiplier of fees for risk assumed by attorney in environmental case); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138 (1991) (holding that expert witness fees were not recoverable as part of "reasonable" attorneys' fee); *Schultz v. Hembree*, 968 F.2d 830, 834 (9th Cir. 1992) (Kozinski, J.) (reversing attorneys' fees award and emphasizing that "[w]e live in a society which, unfortunately, sanctions the view that litigation is a proper response to many of life's hard knocks" and criticizing "[l]awyers capitalizing on this phenomenon"). The logic of *Ardestani* has been applied to bar recovery of attorneys' fees under the EAJA in other types of administrative proceedings. See, e.g., *Friends of the Earth v. Reilly*, 966 F.2d 690, 692 (D.C. Cir. 1992) (environmental proceeding under Resource Conservation and Recovery Act); *Dart v. United States*, 961 F.2d 284, 285 (D.C. Cir. 1992) (export-control proceeding under Export Administration Act).

330. *Ardestani*, 112 S. Ct. at 517.

cution on account of . . . religion" if deported to Iran.<sup>331</sup> Nonetheless, the INS denied her application and sought to deport her.<sup>332</sup> The immigration court granted Ardestani asylum.<sup>333</sup> Finding that the INS's opposition was not "substantially justified," the immigration court awarded Ardestani the modest sum of approximately \$1,000 in attorneys' fees under the Equal Access to Justice Act (EAJA).<sup>334</sup> The BIA reversed,<sup>335</sup> and the United States Court of Appeals for the Eleventh Circuit affirmed.<sup>336</sup>

The Supreme Court, in an opinion by Justice O'Connor, also affirmed.<sup>337</sup> The Court focused almost exclusively on the relevant language of the EAJA:

[A]n agency that conducts an *adversary adjudication* shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.<sup>338</sup>

The EAJA further defines "adversary adjudication" as "an adjudication *under section 554* of this title."<sup>339</sup> Section 554 outlines the formal adjudication requirements of the Administrative Procedure Act (APA).<sup>340</sup> The Court held that a deportation proceeding, which is not governed by the APA, was not an adversary adjudication "under section 554."<sup>341</sup>

In reaching that conclusion, the plain meaning approach carried the

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331. See *id.*; see also *supra* text accompanying notes 158-62 (discussing State Department advisory opinions on asylum applications).

332. *Ardestani*, 112 S. Ct. at 517. The INS argued that because Ardestani stayed in Luxembourg for three days while en route to the United States, she established "safe haven" there. *Id.* The BIA, however, has held that even firm resettlement in a country does not render a person per se ineligible for asylum. See *In re Soleimani*, No. 3118, at 6-7 (BIA July 13, 1989) (interim decision).

333. *Ardestani*, 112 S. Ct. at 517.

334. *Id.*; see 5 U.S.C. § 504 (1988); 28 U.S.C. § 2412 (1988).

335. *Ardestani*, 112 S. Ct. at 517. The BIA vacated the decision and denied the award on the ground that the Attorney General has declared that deportation decisions are not within the scope of the EAJA. *Id.*

336. *Ardestani v. INS*, 904 F.2d 1505, 1515 (11th Cir. 1990), *aff'd*, 112 S. Ct. 515 (1991).

337. *Ardestani*, 112 S. Ct. at 521. Justice Thomas took no part in the consideration or decision in the case. *Id.* at 517. The Supreme Court granted certiorari to resolve a split in the circuits. *Id.* at 518 & n.1.

338. *Id.* at 518 (quoting 5 U.S.C. § 504(a)(1) (1988)) (emphasis added).

339. 5 U.S.C. § 504(b)(1)(C)(i) (1988) (emphasis added).

340. See Administrative Procedure Act, 5 U.S.C. §§ 556, 557 (1988).

341. *Ardestani*, 112 S. Ct. at 519.

day. Because the APA does not apply to deportation proceedings,<sup>342</sup> the Court reasoned that they are not adversary adjudications "under Section 554," even though they are similar in most salient respects to APA-sanctioned proceedings.<sup>343</sup> The relevant statutory language—"an adjudication under section 554"—was "unambiguous" according to the Court.<sup>344</sup> Though emphasizing that the "starting point" is the language of the statute,<sup>345</sup> the Court admitted that "'under' has many dictionary meanings and must draw its meaning from its context."<sup>346</sup> Without inquiry into the relevant context, the Court relied on the Act's "most natural reading" and observed that six courts of appeals had concluded that "the plain and ordinary meaning of 'under' " in the EAJA is that the proceedings must be governed by the APA.<sup>347</sup>

A majority of the Court expressly endorsed a potent version of the plain meaning approach to statutory interpretation: "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' . . . when a contrary legislative intent is clearly expressed."<sup>348</sup> The Court concluded that the EAJA's legislative history failed to "overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used."<sup>349</sup> Although admitting that Congress's only intent in defining adversary adjudications might have been to limit recovery of fees "to trial-type proceedings in which the Government is

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342. See *id.* at 518-19 (relying on *Marcello v. Bonds*, 349 U.S. 302, 310 (1955), which held that the APA does not apply to immigration proceedings).

343. *Id.* at 519. The Court reached its conclusion even though the Attorney General in 1983 promulgated regulations that made deportation proceedings closely conform to the APA's formal adjudication procedures. *Id.* (citing 48 Fed. Reg. 8038-40 (1983)); see also *FRYE*, *supra* note 220, at 30 (noting that in light of fact that EOIR adjudications are similar to formal adjudications under APA, there is no "obvious reason" why they should not be subject to §§ 556 and 557). The Court also rejected Ardestani's argument that deportation proceedings fall "under section 554" for EAJA purposes because, like APA adjudications, they must be determined on the record after a hearing. *Ardestani*, 112 S. Ct. at 519; see INA § 242(b), 8 U.S.C. § 1252(b) (1988) (detailing proceedings to determine deportability).

344. *Ardestani*, 112 S. Ct. at 519.

345. *Id.* (citations omitted).

346. *Id.*

347. *Id.* The Court also observed, as a lower court had recognized in other contexts, that "'under' means 'subject [or pursuant] to' or 'by reason of the authority of,'" *id.* (quoting *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989)), and that "under" was used in other sections of the EAJA to serve as a cross-reference to other sections of the Act. *Id.* at 519 n.2 (quoting 5 U.S.C. §§ 504(a)(2), (c)(2), (d) (1988)).

348. *Id.* at 520 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987), and *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). That presumption apparently would be overcome when adherence to the literal language would produce an absurd result. See *supra* text accompanying note 59.

349. *Ardestani*, 112 S. Ct. at 520 (citations omitted) (quotation marks in original deleted).

represented,”<sup>350</sup> the Court found that the EAJA’s legislative history lacked any “conclusive statement” about the reference to section 554.<sup>351</sup> The Court was not swayed by the statement in the Conference Committee Report<sup>352</sup> that adversary adjudications are those as “defined under” the APA, nor by a change in a draft of the EAJA defining “adversary adjudication” as “an adjudication subject to section 554” to “an adjudication under section 554.”<sup>353</sup> Consequently, the Court literally interpreted the statutory text.

In accepting a plain meaning interpretation, the Court admitted that “[t]he clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.”<sup>354</sup> Furthermore, the Court returned to the context ignored by its plain meaning tack and candidly acknowledged that

*[w]e have no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings. We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important. We acknowledge that Ardestani has been forced to shoulder the financial and emotional burdens of a deportation hearing in which the position of the INS was determined not to*

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350. *Id.*

351. *Id.* (emphasis added).

352. H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 23 (1980).

353. *Ardestani*, 112 S. Ct. at 520.

354. *Id.* at 521 (citing the note following 5 U.S.C. § 504 (1988); H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10, 12 (1980); S. REP. NO. 253, 96th Cong., 2d Sess. 5 (1980)); see Commissioner, INS v. Jean, 496 U.S. 154, 163 (1990) (“[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.”) (citation and footnote omitted). The fact that this “purpose” is part of the law passed by Congress tends to alleviate separation of powers objections to its consideration in interpreting the Act, and also helps avoid the confusion evident in *National Center for Immigrants’ Rights*. See *infra* text accompanying notes 403-11, 422-33. The plain meaning adherents’ refusal to consider congressional purpose raises an interesting question in instances in which Congress states in the law itself the purposes of the enactment. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991) (listing one purpose of act as “respond[ing] to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”); Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1988) (providing that “[f]or the purpose of preventing the unfair use of information which may have been obtained,” a corporate insider must forfeit profits from a purchase and sale of the corporation’s securities occurring within a six month period). Having received bicameral approval, statutory purposes of this type fail to raise separation of powers concerns and generally should stand on a different footing from extrapolated purposes. See *infra* text accompanying notes 380-449 (discussing Court’s faulty use of purpose in *INS v. National Ctr. for Immigrants’ Rights, Inc.*, 112 S. Ct. 551, 558 (1991)).



be substantially justified.<sup>355</sup>

Nevertheless, the Court adamantly refused to depart from a literal reading of the statute and instead left any perceived defect in the law, or the Court's interpretation, for Congress to remedy.<sup>356</sup> Finally, to lend credence to the plain meaning reading, Justice O'Connor invoked the statutory canon calling for narrow interpretations of waivers of sovereign immunity.<sup>357</sup>

Justice Blackmun dissented and emphasized the practical dimensions of the case: Ardestani had been subjected to "the ordeal of a deportation hearing" despite the fact that the INS could not even defend its opposition to her claim to asylum.<sup>358</sup> Besides disputing the statute's "purportedly 'plain' meaning,"<sup>359</sup> Justice Blackmun claimed that the majority abandoned the teaching of the Court's 1989 decision in *Sullivan v. Hudson*<sup>360</sup>—"that the EAJA must be construed 'in light of its purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action.'"<sup>361</sup> He further argued that the statutory language—"under section 554"—might reasonably be read to mean an adjudication "as defined in" or "within the meaning of section 554."<sup>362</sup> To

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355. *Ardestani*, 112 S. Ct. at 521 (emphasis added).

356. *See id.* (observing that Congress amended EAJA to overrule a court of appeals decision and extend its coverage to specific statutes).

357. *Id.* at 520 (citations omitted).

358. *Id.* at 521-22 (Blackmun, J., dissenting). Justice Stevens joined the dissent. *Id.* at 521 (Blackmun, J., dissenting). Justice Blackmun recognized the particular context in which the EAJA was being applied:

The alien's stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive.

*Id.* at 522 (Blackmun, J., dissenting); *cf.* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2853 (1992) (Blackmun, J., concurring in judgment) (arguing that, in advocating that *Roe v. Wade* be overruled, dissent failed to recognize the impact on a woman denied an abortion). *See generally* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1639-52 (1990) (discussing various meanings of "context" and its importance to judicial decisionmaking).

359. *Ardestani*, 112 S. Ct. at 522 (Blackmun, J., dissenting).

360. 490 U.S. 877 (1989). In *Sullivan v. Hudson*, a 5-4 majority, in an opinion again by Justice O'Connor, held that the EAJA applied to proceedings for social security disability benefits in which the government was not represented by counsel, although the Act expressly provides that fees may be awarded in an "adversary adjudication" in which the "position of the United States is represented by counsel or otherwise." *Id.* at 892 (quoting 5 U.S.C. § 504(b)(1)(C) (1988)). Rejecting a plain meaning approach, the Court adopted "the most reasonable interpretation of the statute in light of its manifest purpose." *Id.* at 890.

361. *Ardestani*, 112 S. Ct. at 522 (Blackmun, J., dissenting) (quoting *Sullivan*, 490 U.S. at 890).

362. *Id.* at 523 (Blackmun, J., dissenting) (emphasis in original).

clarify any ambiguity, Justice Blackmun would have looked to the legislative history to determine the interpretation that best served the EAJA's deterrent purpose.<sup>363</sup>

Justice Blackmun's reading of the legislative history revealed that Congress, when drafting the statutory language, focused on adversary proceedings in which the government was represented by counsel,<sup>364</sup> with not even remote hinting that deportation proceedings are not covered.<sup>365</sup> The reference to section 554 simply was "a convenient way to signal . . . the essential and uncontroversial characteristics of an 'adjudication.'" <sup>366</sup> Beyond support in the legislative history, the deterrent purpose of the EAJA would be furthered by its application to deportation proceedings.<sup>367</sup> The nature and complexity of the deportation process, as well as the immigrant's disadvantaged place in the administrative proceedings, make the need for counsel especially acute.<sup>368</sup>

Out of the Court's four immigration decisions last term, *Ardestani* perhaps best illustrates the rise of plain meaning statutory interpretation. By adhering to the nearly impregnable plain meaning "presumption,"<sup>369</sup> the Court upheld the executive branch's interpretation of the law, even though it appeared plainly contrary to Congressional purpose and legis-

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363. *Id.* (Blackmun, J., dissenting).

364. *Id.* (Blackmun, J., dissenting) (discussing H.R. REP. NO. 1434, 96th Cong., 2d Sess. 21, 23 (1980), reprinted in 1980 U.S.C.C.A.N. 5003, 5010, 5012).

365. *Id.* at 524 (Blackmun, J., dissenting).

366. *Id.* (Blackmun, J., dissenting).

367. *Id.* at 525 (Blackmun, J., dissenting).

368. In Justice Blackmun's words:

[U]njustified INS deportation proceedings are a classic example of a situation in which persons "may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved" and the "disparity between the resources and expertise of these individuals and their government." An alien facing deportation generally is unfamiliar with the arcane system of immigration law, is often unskilled in the English language, and sometimes is uneducated; for these reasons, "deportation hearings are difficult to fully comprehend, let alone conduct, and individuals subject to such proceedings frequently require the assistance of counsel." In many areas, competent counsel is difficult to obtain. Evidence indicates that the INS has engaged in abusive litigation tactics.

Finally, the stakes for the alien involved in deportation proceedings—particularly in asylum cases—are enormous.

*Id.* (Blackmun, J., dissenting) (citations omitted); see also *Castro-O'Ryan v. United States Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (emphasizing special need for legal representation in deportation proceedings). The available empirical evidence verifies the common sense assumption that asylum applicants with counsel are more likely to obtain relief than those from the same country, but without representation. See U.S. GEN. ACCOUNTING OFFICE, *ASYLUM: APPROVAL RATES FOR SELECTED APPLICANTS* 2-4 (1987).

369. *Ardestani*, 112 S. Ct. at 520.

lative history. Even the majority with great candor conceded that application of the Act to deportation proceedings would further the law's purpose of deterring litigation abuse by the federal government. Nonetheless, because the lack of availability of attorneys' fees may discourage the few experienced immigration attorneys from representing future applicants, *Ardestani* may tend to reduce the filing of asylum claims,<sup>370</sup> a result in keeping with the general thrust of the Rehnquist Court's reform efforts. In a similar vein, there will be no litigation over attorneys' fees (and no need for the further "waste" of judicial and litigants' time and resources) in deportation proceedings.

Despite adhering to plain meaning principles, the majority curiously invoked a statutory canon to fortify its plain meaning conclusion, while simultaneously ignoring a competing canon of construction.<sup>371</sup> Invocation of a statutory canon seems inconsistent with the plain meaning approach,<sup>372</sup> but this occurrence is not unusual. The Court in the October 1991 term repeatedly invoked the sovereign immunity canon relied upon in *Ardestani*,<sup>373</sup> despite the ready availability of other potentially applicable ones.<sup>374</sup> Assuming that canons may modify the plain meaning of a statute, the Court failed to observe an equally, if not more compelling,

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370. See *supra* note 329.

371. As Llewellyn observed, "there are two opposing canons on almost every point." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950); see also POSNER, *supra* note 57, at 282 (mentioning similar problems in use of canons and that "they are very difficult to weigh against each other") (footnote omitted). See generally Symposium: *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992) (discussing, sometimes critically, Llewellyn's views on canons). For example, while willing to invoke the sovereign immunity canon, see *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1014-15 (1992) (Scalia, J.) (relying on canon of narrow construction of waivers of sovereign immunity), Justice Scalia lambastes other canons. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581-86 (1989-90) (criticizing interpretive canon that "remedial statutes are to be liberally construed"); see also Scalia, *supra* note 57, at 13 (recognizing that canons of statutory construction "leav[e] it to the judge to pick that one which produced the result he desired").

372. For a thoughtful analysis of the use of canons by the Rehnquist Court, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611-29 (1992).

373. See *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992); *Nordic Village*, 112 S. Ct. at 1014-15.

374. See *United States Dep't of Energy*, 112 S. Ct. at 1641 (White, J., concurring in part, dissenting in part) ("It is axiomatic that a statute should be read as a whole.") (citation omitted); *Nordic Village*, 112 S. Ct. at 1019-20 (Stevens, J., dissenting) (claiming that "Court's love affair with the doctrine of sovereign immunity" led to conclusion contrary to text, legislative history, and policy of Bankruptcy Code); see also POSNER, *supra* note 57, at 280 (arguing that canon that waivers of sovereign immunity are to be narrowly construed is not "interpretive at all" but is a "presumption[] based on substantive policy").

canon. As it had failed to do in *Elias-Zacarias*,<sup>375</sup> the Court in *Ardestani* never mentioned "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," a principle acknowledged as recently as 1987.<sup>376</sup> This suggests that the use of canons is not entirely objective.

As we shall see, the rigid interpretive approach of *Ardestani* is starkly at odds with the liberal method followed by *INS v. National Center for Immigrants' Rights, Inc.*<sup>377</sup> The common denominator in the two decisions is deference to the executive branch. The INS is shielded from exposure for asserting unfounded positions and in effect the Court defers to, if not sanctions, that conduct. In light of the INS's frivolous opposition to *Ardestani*'s asylum claim, which even the Department of State endorsed,<sup>378</sup> deference to the INS is wholly unjustified. *Ardestani* permits the continuation of adamant resistance by the INS and the executive branch to the claims of many asylum-seekers.<sup>379</sup> By justifying deference through plain meaning statutory interpretation, the Court glossed over such subtleties, reached a result plainly contrary to Congressional purpose, and allowed a valid claim of administrative abuse to go unredressed and undeterred.

C. *Unemployment as a Bond Condition: INS v. National Center for Immigrants' Rights, Inc.*

In one way, *INS v. National Center for Immigrants' Rights, Inc.*<sup>380</sup> is the most "exceptional" of the four immigration decisions from last term. In that case, the Supreme Court abandoned the plain meaning principle. The Court, however, did so in order to defer to the INS's interpretation of a regulation. *National Center for Immigrants' Rights'* selective departure from plain meaning principles suggests, therefore, that the Rehnquist Court is more concerned about deferring to the executive branch's immigration decisions than about plain meaning interpretation of statutes.

Section 242(a) of the INA authorizes the INS to detain immigrants while deportation proceedings are pending.<sup>381</sup> The INS in the 1980s

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375. See *supra* text accompanying notes 221-79.

376. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987) (citations omitted).

377. 112 S. Ct. 551 (1991); see *infra* text accompanying notes 380-449 (discussing decision).

378. See *supra* text accompanying note 331.

379. See *supra* text accompanying notes 326-28.

380. 112 S. Ct. 551 (1991).

381. See INA § 242(a), 8 U.S.C. § 1252(a) (1988). That section provides, in pertinent part, that

often aggressively exercised this authority, and, consequently, its detention policies were challenged regularly, often by asylum-seekers.<sup>382</sup> Critics claimed that, consistent with INS intent, immigrants kept in detention for lengthy periods often lose hope, abandon colorable claims to relief provided for by the INA, and "consent," in the loosest sense of the word, to immediate deportation.<sup>383</sup>

The INA gives discretion to INS district directors to determine conditions for release of immigrants from detention on bond.<sup>384</sup> Few regulations limit that discretion.<sup>385</sup> Consistent with the practice generally followed in criminal proceedings,<sup>386</sup> the INS until recently established bond at an amount designed to ensure the immigrant's appearance at deportation proceedings.<sup>387</sup> *INS v. National Center for Immigrants' Rights, Inc.*<sup>388</sup> involved a challenge to a regulation that marked a change in direction in the INS use of the bond system.

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[p]ending a determination of deportability in the case of any alien . . . , such alien may . . . be arrested and taken into custody. . . . [A]ny such alien taken into custody may, in the discretion of the Attorney General . . . (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

*Id.* (emphasis added).

382. See, e.g., *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 559-67 (9th Cir. 1990) (affirming detailed findings by district court that INS through pattern and practice of conduct interfered with detained Salvadorans' rights to apply for asylum and to counsel); see also *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352, 1365 (9th Cir. 1991) (en banc) (invalidating INS regulation that required detention of immigrant children unless an adult relative or legal guardian assumed custody), *cert. granted*, 112 S. Ct. 1261 (1992). The INS, surprisingly enough, admits that it has employed detention in an effort to reduce the number of asylum applications filed in southern Texas. See IMMIGRATION AND NATURALIZATION SERV., *supra* note 220, at xxx.

383. See, e.g., ABA COORDINATING COMM. ON IMMIGRATION LAW, LIVES ON THE LINE: SEEKING ASYLUM IN SOUTH TEXAS 5-13 (1989) (discussing the impact of stringent measures taken by INS in South Texas, including detention of Central Americans and rapid processing of asylum claims); LAWYERS COMM. FOR HUMAN RIGHTS & HELSINKI WATCH, MOTHER OF EXILES: REFUGEES IMPRISONED IN AMERICA 3-62 (1986) (compiling interviews of asylum-seekers detained by INS describing basis for claims of persecution and negative impact of detention on pursuing claim).

384. See INA § 242(a), 8 U.S.C. § 1252(a) (1988); 8 C.F.R. § 103.6 (1992).

385. Consequently, critics claim that the INS has engaged in a pattern of arbitrary treatment in the setting of bond. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *supra* note 150, at 104-07, 113-14; U.S. GEN. ACCOUNTING OFFICE, INS DELIVERY BONDS: STRONGER INTERNAL CONTROLS NEEDED 3 (1988); see also Janet A. Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 SAN DIEGO L. REV. 347, 348-49, 392 (1987) (concluding that immigration court is not in ideal position to set bond designed to assure appearance at deportation proceedings).

386. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §§ 12.1-12.3, at 596-613 (2d ed. 1992).

387. See *infra* text accompanying notes 445-48.

388. 112 S. Ct. 551 (1991).

The Attorney General in 1983 promulgated a regulation, pursuant to INA section 242(a), that provided in pertinent part that "[a] condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate."<sup>389</sup> While the title of the regulation—"Condition against *unauthorized* employment"—is limited, the regulation's text bars any employment by all immigrants.<sup>390</sup> The National Center for Immigrants' Rights, Inc., among others, challenged the regulation on statutory and constitutional grounds.<sup>391</sup> After lengthy and circuitous proceedings, including an abbreviated trip to the Supreme Court, the Court of Appeals for the Ninth Circuit affirmed the district court's invalidation of the regulation.<sup>392</sup>

The Supreme Court, in a unanimous opinion authored by Justice Stevens, reversed.<sup>393</sup> The Court framed the "narrow question of statutory construction" as whether section 242(a) of the INA barred a regulation conditioning release of an immigrant from detention on not engaging in " 'unauthorized employment.' "<sup>394</sup> The INS contended that, as the title suggests, the regulation only prohibits employment by persons who lack work authorization.<sup>395</sup> Despite often slavish adherence to the plain meaning of the law,<sup>396</sup> the Court readily embraced the INS interpretation and held that the title of the regulation modified "employment" in the text to mean "unauthorized employment."<sup>397</sup> That interpretation

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389. 8 C.F.R. § 103.6(a)(2)(ii) (1992).

390. *Id.* (emphasis added); see *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 556.

391. *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 554.

392. *National Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1374 (9th Cir. 1990), *rev'd*, 112 S. Ct. 551 (1991). The district court initially entered a preliminary injunction barring enforcement of the regulation, which was affirmed in part by the Court of Appeals for the Ninth Circuit. *National Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365 (9th Cir. 1984). The district court on remand invalidated the regulation, and the Ninth Circuit affirmed. *National Ctr. for Immigrants' Rights, Inc. v. INS*, 791 F.2d 1351, 1356 (9th Cir. 1986), *vacated and remanded*, 481 U.S. 1009 (1987). The Supreme Court vacated and remanded for further consideration in light of enactment of the Immigration Reform and Control Act (IRCA). *INS v. National Ctr. for Immigrants' Rights, Inc.*, 481 U.S. 1009, 1009-10 (1987). The district court on remand held that IRCA did not confer upon the Attorney General the authority to impose a blanket no-work rider on bond and the Ninth Circuit affirmed. *National Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d at 1351-52, 1359-74.

393. *INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 559-60 (1992).

394. *Id.* at 553 (quoting Petition for Certiorari I). Plaintiffs mounted a facial challenge to the regulation, and the Court did not address the possibility that it might be improperly applied. *Id.* at 555. Because the court of appeals had not decided any of the constitutional challenges to the regulation, neither did the Supreme Court. *Id.*

395. *Id.* at 556.

396. See *supra* text accompanying notes 45-78, 221-79, 326-79.

397. *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 556-60.

was supported by the fact that the regulation authorized the district director to permit employment by an immigrant<sup>398</sup> and also was supported by extra-textual sources, such as INS responses to comments made when the rule was promulgated<sup>399</sup> and internal INS office instructions.<sup>400</sup> To buttress departure from the plain meaning approach, the Court invoked the deference principle. Based on a petition for certiorari filed by the INS in the case in 1986,<sup>401</sup> the Court labeled the agency's interpretation as "consistent" and therefore entitled to deference.<sup>402</sup>

The Court distinguished previous decisions that restricted the Attorney General's discretion under other provisions of the INA. It first distinguished *United States v. Witkovich*,<sup>403</sup> in which the Court eschewed a literal interpretation of the INA to avoid harsh results contrary to the legislative history and raising serious constitutional questions.<sup>404</sup> From this case, in which the Court "define[d] the scope of the Attorney General's discretion" by considering the purpose of the INA as a whole.<sup>405</sup> The Court further rejected the Ninth Circuit's reading of *Carlson v. Landon*<sup>406</sup> as only affording the Attorney General the discretion over detention "to protect the Nation from active subversion."<sup>407</sup> With remarkably

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398. *Id.* at 556 & n.3.

399. *Id.* at 556 & n.4. In the promulgation process, the INS represented that, because the regulation would not affect them, permanent resident aliens might work while released on bond. *See id.*

400. *See id.* at 556 & n.5 (quoting *INS Operating Instructions* 103.6(i) (1983) which provides that "[i]ndividuals maintaining a colorable claim to U.S. Citizenship and permanent resident aliens, authorized to work in the United States . . . shall not be subject to this general prohibition until such time as a final administrative determination of deportability has been made").

401. *See id.* at 556 & n.2; *see also supra* note 392 (outlining procedural history of case). The Court further observed that there was no evidence in the record that the INS had applied the regulation to bar "authorized" employment or that the individual plaintiffs were authorized to work in the United States. *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 556-57 & n.6.

402. *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 556 ("[A]n agency's reasonable, consistently held interpretation of its own regulation is entitled to deference.").

403. 353 U.S. 194 (1957). *Witkovich* involved the statutory authority of the Attorney General "to require deportable aliens to provide the INS with information about their 'circumstances, habits, associations and activities, and other information deemed fit and proper.'" *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 557 (quoting 8 C.F.R. § 242.3(c)(3) (1956)). Justice Frankfurter, although admitting that the statute "appear[ed] to confer upon the Attorney General unbounded authority," rejected the "tyranny of literalness" because "a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *Witkovich*, 353 U.S. at 199.

404. *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 557-58.

405. *Id.* at 558.

406. 342 U.S. 524, 534 (1952) (upholding detention of deportable members of the Communist party on ground that they posed a threat to national security).

407. *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 558.

little discussion, the Court summarily concluded that the “*stated and actual* purpose of the no-work bond conditions was ‘to protect against the displacement of workers in the United States.’”<sup>408</sup> That policy, the Court reasoned, is consistent with a “primary purpose” of the INA,<sup>409</sup> which Congress reinforced in 1986 through passage of the Immigration Reform and Control Act.<sup>410</sup> The Court cited a snippet of legislative history in support of its conclusion about a “primary purpose” of the INA.<sup>411</sup>

Finally, the Court rejected the argument that the blanket no-work regulation failed to provide for the individual bond decisions mandated by the INA.<sup>412</sup> Although recognizing that consideration of an individual’s case was necessary to the proper exercise of discretion, the Court found that measure present in the system in place.<sup>413</sup> The Court based that conclusion on a variety of considerations left unmentioned by the *text* of the regulation: the Attorney General interpreted the regulation as applying only to unauthorized employment;<sup>414</sup> INS internal instructions stated that the regulation would not apply to persons with a “colorable claim of U.S. citizenship”;<sup>415</sup> the INS represented that asylum applicants would not be subject to the regulation;<sup>416</sup> and the Solicitor General represented in a brief that the INS will determine early in the proceedings whether an “alien” is authorized to work.<sup>417</sup> The Court read this myriad

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408. *Id.* (quoting 48 Fed. Reg. 51,142 (1983) (emphasis added) (citation omitted). In promulgating the regulation, the INS stated that “unauthorized work is a continuing violation of the immigration laws. Unauthorized work is in direct contravention of one of the ‘dominant purpose[s] of the immigration laws,’ which is ‘to protect American workers.’” 48 Fed. Reg. at 51,142 (alteration in original) (no citations in original).

409. *National Ctr. for Immigrants’ Rights*, 112 S. Ct. at 558 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984)).

410. *See id.* at 558 n.8.

411. *See id.* (citing H.R. REP. NO. 1365, 82d Cong., 2d Sess. 50-51 (1952) (discussing safeguards for American labor)).

412. *Id.* at 558-59.

413. *Id.* (emphasizing that absent some degree of individual decisionmaking, “legitimate exercise of discretion is impossible”); *see, e.g., Heckler v. Campbell*, 461 U.S. 458, 467 (1983); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

414. *National Ctr. for Immigrants’ Rights*, 112 S. Ct. at 559.

415. *Id.*; *see supra* note 400 (quoting *INS Operating Instructions*).

416. *National Ctr. for Immigrants’ Rights*, 112 S. Ct. at 559 (quoting 48 Fed. Reg. 51,142, 51,143 (1983), which permits a district director to authorize employment for an asylum applicant who has filed a non-frivolous application); *see also* 8 C.F.R. § 208.7(a) (1992) (requiring INS to authorize temporary employment to asylum applicant unless application is “frivolous”). But if, as the Supreme Court apparently authorized, the Attorney General may promulgate regulations to protect “American jobs,” it is unclear why he could not lawfully bar employment by asylum applicants.

417. *National Ctr. for Immigrants’ Rights*, 112 S. Ct. at 559 (citing Brief for Petitioners at 35).



of extra-textual evidence as "substantially narrow[ing] the reach of the regulation."<sup>418</sup>

As with the other immigration decisions, the holding of *National Center for Immigrants' Rights*, at least on its face, is limited. Nevertheless, as in *INS v. Cardoza-Fonseca*, the Court went far beyond the plain meaning of the regulation in its interpretation. Unlike *Cardoza-Fonseca*, however, *National Center for Immigrants' Rights* employed extra-textual sources to allow the INS to circumvent the plain meaning of its own regulation. Indeed, the Court went to extraordinary lengths to consider so-called congressional purpose, legislative history, and numerous other extraneous sources to uphold a regulation promulgated pursuant to a broad delegation of authority. Furthermore, the Court identified a purported "primary" purpose of the INA and read the exercise of administrative discretion bestowed by the regulation to be consistent with that purpose.<sup>419</sup> This eclectic mode of interpretation, of course, is anathema to plain meaning doctrine.<sup>420</sup> At the same time, however, the Court interpreted the INA's delegation of the detention power to the Attorney General quite broadly, as the plain meaning approach might dictate.<sup>421</sup>

The plain meaning doctrine criticizes reviewing a law's legislative history to determine its "purpose," a particularly apt criticism in evaluating *National Center for Immigrants' Rights*.<sup>422</sup> The Court clearly overstated the holding of *Sure-Tan, Inc. v. NLRB*,<sup>423</sup> the only case it cited for

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418. *Id.* at 559. Additional provisions, such as administrative and judicial review of bond conditions, *id.* (citing 8 C.F.R. §§ 3.18, 242.2 (1992)), and the ability to seek temporary work authorization, *id.* (citing 8 C.F.R. § 103.6(a)(2)(iii) (1992)), in the Court's view, enhanced the process available to ensure an individualized bond decision.

The Court reversed and remanded the case for further proceedings consistent with the opinion. *Id.* at 559-60.

419. *See supra* text accompanying notes 408-11.

420. *See supra* text accompanying notes 45-78.

421. *See supra* text accompanying notes 403-11.

422. *See supra* text accompanying notes 45-78. As the Supreme Court has observed, [a]pplication of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

*Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) (Burger, C.J.); *see Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *Continental Air Lines, Co. v. Department of Transp.*, 843 F.2d 1444, 1451 (D.C. Cir. 1988) (Starr, J.). *But see Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (emphasizing "well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute"); *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) (applying similar principle).

423. 467 U.S. 883 (1984).

the "purpose" of the INA, which merely decided that the National Labor Relations Act covered undocumented workers. Although stating that "[a] primary purpose *in restricting immigration* is to preserve jobs for American workers,"<sup>424</sup> the Court in *Sure-Tan* further acknowledged that "[t]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."<sup>425</sup> *Sure-Tan* thus stands for no less a proposition than that the INA's purposes are multi-faceted and are specific to the particular statutory provisions under scrutiny. The broad brush approach of *National Center for Immigrants' Rights* failed to account for such nuances.

To further document a "primary purpose" of the INA, Justice Stevens cited a two-paragraph discussion out of a 328-page House report concerning "Safeguards for American Labor."<sup>426</sup> It seems ill-advised to divine on such shaky grounds a primary purpose of a complex statutory scheme amended almost annually since its enactment in 1952, which reflects the delicate balancing of a diversity of conflicting interests. To boil down the INA to a single "primary purpose" is nearly impossible,<sup>427</sup> just as it would be to perform the same feat for the Internal Revenue Code or the Bankruptcy Code. For example, as the Supreme Court suggested, the Immigration Reform and Control Act, in amending the INA, included certain provisions hailed by some as an effort to protect American jobs by providing for the imposition of sanctions on employers who employ undocumented labor.<sup>428</sup> That Act, however, also created amnesty and Special Agricultural Worker programs offering benefits to eligible immigrants.<sup>429</sup> As is true of many laws, including the many other

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424. *Id.* at 893.

425. *Id.* at 892 (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1979)).

426. See *National Ctr. for Immigrants' Rights*, 112 S. Ct. at 558 n.8 (citing H.R. REP. NO. 1365, 82d Cong., 2d Sess. 50-51 (1952), reprinted in 1952 U.S.C.C.A.N. 1653).

427. See Roberts, *supra* note 153, at 4 (stating that in INA and "patchwork of amendments which followed, Congress has reflected no clear immigration policy") (footnote omitted).

428. See Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, title I, § 101(a), 100 Stat. 3360 (codified as amended at 8 U.S.C.A. § 1324a (West 1970 and Supp. 1992)).

429. See IRCA §§ 201, 301-05, 100 Stat. 3360 (1986); see also GÓNZALEZ BAKER, *supra* note 149, at 51-52 ("Like any major policy reform, IRCA legalization is filled with compromises, tradeoffs, and ironies."). IRCA has at least three "purposes," including "to control illegal immigration to the U.S., make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982." H.R. REP. NO. 682(I), 99th Cong., 2d Sess. 45 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649. For a discussion of the many compromises in IRCA and the often conflicting purposes of the law, see Bill Ong Hing, *The Immigration and Naturalization Service, Community-Based Organizations, and the Legalization Experience: Lessons for the Self-Help Immigration Phenomenon*, 6 GEO. IMMIGR. L.J. 413, 475-91 (1992) (Appendix B).

amendments to the INA,<sup>430</sup> the legislation reflects the balancing of many interests and great care should be taken in deriving a "primary purpose" for any specific provision, much less the Act as a whole.<sup>431</sup> This is not to claim that reliance on congressional purpose and legislative history is per se inappropriate. Much greater care, however, was necessary than the Court was willing to supply.<sup>432</sup>

What is the explanation for this seemingly inexplicable deviation from plain meaning principles? It could be explained by shifting coalitions on the Court, particularly the fact that Justice Stevens, the author of the unanimous opinion, advocates a traditional approach to statutory interpretation.<sup>433</sup> What seems odd is that plain meaning's strongest supporter, Justice Scalia, failed to quibble with the interpretive mode employed by the majority.<sup>434</sup> Perhaps that occurrence is explained by the fact that the result was plainly deferential to the executive branch.

One might ask whether it matters what the Court considered in interpreting the regulation because the Attorney General could always rewrite the regulation to limit its reach to be consistent with the representations made to the Court. Although that might be true, the Attorney General should have been forced to promulgate the narrower regulation in light of the INS's spotty record in enforcing immigration laws and regulations<sup>435</sup> and its failure to honor representations made to

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430. See, e.g., CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE: SPECIAL SUPPLEMENT, IMMIGRATION ACT OF 1990 § 1.02, at 7 (1991) (observing that Immigration Act of 1990 has "humanitarian" and "excessively severe" components and that "[m]any practitioners and scholars will regard the statute as a mixed bag of beneficial and punitive provisions").

431. Reliance on purpose was not the Court's only plain meaning sin. In departing from plain meaning principles, the Court allowed the regulation's title to modify the text. It previously had considered the title of a statute in its interpretation when the text was ambiguous. See, e.g., *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (resolving ambiguity by examining the title of statute); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959) (finding the title "a useful aid" in resolving an ambiguity); see also *United States v. Palmer*, 16 U.S. (3 Wheat) 610, 631 (1818) (Marshall, C.J.) ("The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature."). In the case before the Court, however, the plain meaning of the regulatory text was unambiguous and contrary to the title. See Llewellyn, *supra* note 371, at 403 (mentioning canon of statutory interpretation that "[t]itles do not control meaning" of text). The Court thus distorted the rule of its previous cases to accommodate the case at hand.

432. See Eskridge, *New Textualism*, *supra* note 22, at 684-90.

433. See *supra* text accompanying notes 51, 75-77; see also Easterbrook, *supra* note 65, at 802 (noting that institutional nature of Court necessarily leads to some inconsistency in decisions).

434. See *The Supreme Court—Leading Cases*, 105 HARV. L. REV. 177, 419 (1991) (statistical breakdown showing that Justice Scalia wrote 18 of the 47, or almost 40%, of the concurring opinions filed in the October 1990 Term).

435. See *supra* text accompanying notes 130-90.

the Court.<sup>436</sup> In any event, a narrowed regulation, in my view, still exceeded the authority delegated by the statute due to inconsistency with the INA's provision of a variety of types of relief from deportation available to immigrants as well as the legislative history concerning the scope of the Attorney General's detention power.

In that vein, a different result might have been reached if the Court had reviewed the no-work regulation in light of the long-standing INS practice of employing bond to ensure appearance at deportation proceedings<sup>437</sup> and the adverse impact of the regulation on the pursuit of claims to relief provided for by the INA.<sup>438</sup> Moreover, the legislative history to the detention and bond provision of the INA, which was incorporated into the Act from a predecessor law,<sup>439</sup> reflects Congressional concern with detaining and deporting Communists and criminals and ensuring the appearance of persons at their deportation proceedings.<sup>440</sup> There is no indication in the legislative history of concern with immigrants displacing domestic workers while on bond during the pendency of their deportation proceedings.

Although caution was called for, the Court blindly accepted the INS representation that the purpose of the regulation was to protect "American jobs," despite the impact of the regulation of discouraging noncitizens pursuing benefits provided to noncitizens by the INA.<sup>441</sup> As Maurice Roberts points out:

No one can deny that detention, often prolonged, of an alien in deportation proceedings pending hearing and final determination of the charges can be a potent factor in influencing the alien not to contest the charges. For one thing, many aliens who are the subjects of deportation proceedings are not persons

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436. See *infra* note 443 and accompanying text.

437. See *infra* text accompanying notes 443-48.

438. Even plain meaning adherents might permit such an approach. See, e.g., *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (Scalia, J.) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . .").

439. Section 242(a) of the INA regarding detention originally was included in the Internal Security Act of 1950, Pub. L. No. 81-831, Title 1 (Subversive Activities Control Act of 1950), § 23, 64 Stat. 987, 1010-12, and later carried forward to the INA. See H.R. REP. NO. 1365, 82d Cong., 2d Sess. (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1711-13.

440. See S. REP. NO. 2239, 81st Cong., 2d Sess. 5-8 (1950); H. R. REP. NO. 1192, 81st Cong., 1st Sess. 6-9 (1949). The Ninth Circuit relied on this legislative history to invalidate the regulation. See *National Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1358-59 (9th Cir. 1990).

441. See, e.g., INA § 244, 8 U.S.C. § 1254 (1988) (suspension of deportation); *id.* § 245, 8 U.S.C. § 1255 (adjustment of status of nonimmigrant to that of person admitted for permanent residence).

of independent means. If they cannot work pending final determination, they cannot support their families, and cannot even earn the money needed to pay counsel. While many are clearly deportable, others may have a tenable defense to the charges or may be eligible for one or another of the many forms of discretionary relief from deportation. The statutes and regulations are highly complex, and the related administrative and judicial decisions come in torrents. Without representation by a skilled professional, an alien in deportation proceedings is severely handicapped. *In addition, the prospect of prolonged detention may in itself be a sufficient inducement to throw in the towel. The INS can hardly be unaware of these factors in imposing blanket "no work" conditions in the bonds of aliens who are likely to appear when wanted. . . . In my estimation, it is an abuse of governmental power to use detention, or the threat of detention, as a lever to force an undocumented alien to give up an open course which the alien might otherwise be free to pursue. The detention power was not designed by Congress to enable the INS to exert such leverage.*<sup>442</sup>

Through ignoring plain meaning teachings,<sup>443</sup> the Court in *National*

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442. Maurice A. Roberts, *Some Thoughts on the Wanton Detention of Aliens*, 5 GEO. IMMIGR. L.J. 225, 235 (1991) (emphasis added). A recent study revealed that 78% of those held in detention by the INS lacked representation by counsel. See U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 45 (1992).

443. This is not the first time that the Court has departed from the plain meaning approach to defer to the INS. In *Jean v. Nelson*, 472 U.S. 846 (1985), the Court accepted the Solicitor General's admission that the INA conferral of facially unfettered discretion to the Attorney General, see INA § 212(d)(5)(A), 8 U.S.C. § 1182 (d)(5)(A) (1988) (providing that Attorney General may "in his discretion" parole into the country an "alien" applying for admission "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest"), does not permit invidious discrimination on the basis of race or national origin by the Attorney General. By accepting this admission, the Court avoided the constitutional challenges. See *Jean*, 472 U.S. at 855-57; see also Motomura, *supra* note 131, 547-48, 590-613 (criticizing *Jean* because statutory manipulation allowed the Court to avoid addressing continuing vitality of plenary power doctrine). Although he failed to restrict the INS's discretion in any formal way, the Attorney General represented to the Court that it was limited. The Court's acceptance of this representation has nothing to do with the INA's text and amounts to little more than taking the INS's word that the law will be applied equitably. Since *Jean v. Nelson*, claims have persisted that the executive branch's treatment of the Haitians has been affected by their race and nationality. See James Harney, *Critics of U.S. Policy See Racist Overtones*, USA TODAY, Feb. 3, 1992, at 2A; *supra* note 7.

The INS theoretically would be bound by representations made to the Court in *National Center for Immigrants' Rights*. If, as the logic of *Chevron* suggests, however, an agency may change its interpretation of the law, see *supra* text accompanying notes 223-44, it follows that it may change the interpretation of a regulation. Moreover, the executive branch does not always honor representations made in immigration litigation, even those made to the Supreme Court. See, e.g., *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1356-57 (2d Cir.) (noting change in Haitian interdiction program contrary to representations made to the Court

*Center for Immigrants' Rights* was able to follow its custom of deferring to the INS's judgment. The Court's conclusory assertion that it would defer to the agency's "consistent" interpretation of the regulation is as questionable as its reliance on the INA's "primary purpose" in justifying its holding.<sup>444</sup> Even assuming that the interpretation of the regulation was consistent,<sup>445</sup> the agency practice in applying the statute authorizing the regulation most definitely was not. In 1974, over two decades after the INA's enactment, the Attorney General recognized that a no-work condition had never before been employed in a bond issued in connection with deportation proceedings.<sup>446</sup> A predecessor regulation afforded discretion to impose a no-work condition in individual cases, but not one presumptively applicable to all cases.<sup>447</sup> The blanket no-work condition therefore was a novel use of the discretion delegated by the INA to the Attorney General and, at a minimum, warranted further study rather than simple deference.<sup>448</sup>

In evaluating the propriety of deference, the INS's long record of heavy-handed enforcement tactics also should weigh heavily against it.<sup>449</sup> Considering that fact, the Court's deference to the agency's interpretation of the bond regulation is highly inappropriate. Once again, the Court evaluated INS conduct without regard to its context or a realistic appraisal of the relatively weak adversary position of many immigrants. The Court never considered the undisputed impact of the regulation on immigrants seeking to pursue their rights. Intent on deferring to the INS, the Court searched for kernels of evidence supporting deference when more searching inquiry into the purpose and impact of the regulation was justified. Put most bluntly, the analysis shows a Court willing to subvert plain meaning teachings to reach a result deferential to the agency.

In sum, the approach of *National Center for Immigrants' Rights*

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when convincing it to deny petition for writ of certiorari in related case), *cert. granted*, 113 S. Ct. 52 (Oct. 5, 1992).

444. See *supra* text accompanying notes 401-02. Recall that the Court completely failed to mention, much less discuss, the inconsistency of the BIA interpretation of the statutory language at issue in *Elias-Zacarias*. See *supra* text accompanying notes 273-75.

445. In fact, the Court might have treated the INS interpretation as a "litigating position," a category of agency interpretations exempt from the deference doctrine. See *supra* text accompanying note 40.

446. See *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 550 n.2 (AG 1974) (ruling that regulation was necessary in order to impose no-work condition in bond). See generally Roberts, *supra* note 442, at 227-34 (tracing history of conditions placed on bonds by INS).

447. See *INS v. National Ctr. for Immigrants' Rights*, 112 S. Ct. 551, 554 (1992).

448. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-57 (1983).

449. See *supra* notes 148-51 and accompanying text.

stands in stark contrast to *Elias-Zacarias* and *Doherty*, in which the Court employed the plain meaning approach and deferred to the executive branch. To some degree, the Court is ready and willing to abandon plain meaning principles to justify deference to the executive branch in immigration matters. At least in *National Center for Immigrants' Rights*, the deference presumption trumped plain meaning methodology.

## VII. CONCLUSION

Long denied the most basic protections of the Constitution, immigrants now find themselves subject to the same general rules of the game that the Rehnquist Court applies to others in the administrative process. A potent form of deference to the conduct of administrative agencies, often combined with plain meaning statutory interpretation, has proved a windfall for the executive branch when it comes to immigration. Application of those doctrines has meant not only that the Attorney General, with control over the INS and BIA, has virtually unfettered discretion over immigration law and policy, but also that the immigrant has limited recourse to the courts for review of immigration decisions.

This judicial hands-off approach may augur a return to the days of the plenary power doctrine when the Supreme Court refused to question this nation's blatantly racist treatment of Chinese immigrants, now clearly a dark chapter in our immigration past. Over the years, plenary power was superseded to some extent by more careful review by the Judiciary of the executive branch's immigration decisions. With the Court's movement toward deference to the executive branch in immigration matters, however, we move toward completion of the circle and return to where the journey began. A return to plenary power, of course, would be the ultimate in docket clearing and caseload reduction.

It is true that the Court in the four immigration cases decided in the October 1991 Term never expressly invoked the plenary power doctrine. Nonetheless, the Court unquestionably expanded the cloak of immunity shielding executive branch prerogative over immigration matters. The Court did so despite the fact that the INS, under the direction of the Attorney General, time and again has been accused—and found by courts to be guilty—of engaging in abusive tactics against immigrants. Similarly, the independence of the BIA remains in doubt. By applying the deference and plain meaning doctrines, the Court erroneously avoided examining such fundamental questions as the merits of the decision being reviewed, the intricacies of the statute being administered (including reliable evidence of the purposes of Congress in passing specific provisions of the law), the appearance of undue partiality by the agency

entrusted with decisionmaking, and the nature of the interests implicated by the agency ruling.

At the beginning of this Article, I mentioned that, because of their symbolic value, some Supreme Court decisions become larger than life. To some, the mere fact that immigrants lost four consecutive cases in two months says enough. At a minimum, however, the decisions send a clear signal to the executive branch that its judgment in immigration matters rarely will be disturbed, and instruct the lower courts to exercise great restraint before disturbing the executive branch's immigration decisions. Although advocates of refugee rights will adeptly attempt to navigate carefully around these decisions, their clear message—that when the executive branch and the immigrant disagree, the executive branch prevails—may be difficult to rebut. That message, which almost inevitably will tend to reduce immigration litigation and appeals, may be precisely the one that the Court wanted to send.

Such messages are not limited to immigration law. Besides pursuing ideological goals, the Rehnquist Court seeks to establish generally applicable, inflexible rules and strong presumptions that reduce litigation and judicial workload. This appears particularly true with respect to the more “typical” and “trivial” statutory interpretation and administrative action cases, that sometimes involve complex substantive issues that may be bland to all but the experts. Concerns with the “crisis” caused by the “litigation explosion” are very real to the current Court, which through doctrinal developments in a variety of substantive areas has sought to reduce litigation and appeals. By creating default principles that facilitate decisionmaking, the Court undoubtedly will “reform” the litigation process in the federal courts. Part of the reformation unfortunately may mean that broad efficiency concerns with docket management prevail over justice in the individual case.

Assuming that the deference and plain meaning doctrines make sense when applied to other bodies of law, this is not the case with respect to immigration. Unlike other political constituencies, immigrants lack the raw political power to serve as a check on agency misconduct or to override the plain meaning interpretations of the immigration laws by the courts. This is true even if a largely apathetic public, which often is not directly impacted, is appalled at the treatment of immigrants by the INS and BIA and the courts' plain meaning interpretation of the INA. Nonetheless, the Supreme Court has ignored the political realities of the situation.

Where are we left? The immigrant has little chance of prevailing in the political marketplace to correct the heavy-handed policies, practices, and decisions of the executive branch and to remedy deficiencies in the



courts' plain meaning interpretation that guarantees deference to agency action. Moreover, in light of the Supreme Court's recent pronouncements, the immigrant often will have little hope of securing meaningful judicial review of INS and BIA decisions. For those reasons, *INS v. Elias-Zacarias*,<sup>450</sup> *INS v. Doherty*,<sup>451</sup> *Ardestani v. INS*,<sup>452</sup> and *INS v. National Center for Immigrants' Rights, Inc.*<sup>453</sup> unfortunately may mark a watershed with respect to the rights of immigrants. As the Court moves toward concrete rules, we must remember that bright lines do not necessarily mean fair results.

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450. 112 S. Ct. 812 (1992).

451. 112 S. Ct. 719 (1992).

452. 112 S. Ct. 515 (1991).

453. 112 S. Ct. 551 (1992).